

No. 15381

United States
Court of Appeals
for the Ninth Circuit

EARL G. ARONSON, Administrator of the Estate
of Flora Ritta Mae Aronson, Deceased, for the
benefit of said Estate and Earl G. Aronson,
surviving husband and Earlene A. Roberts,
Betty C. Howard and Earl G. Aronson, Jr.,
surviving children of said decedent,
Appellants,

vs.

GEORGE A. McDONALD, Appellee.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Division

FILED

FEB 15 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Fairbanks, Alaska,

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Attorneys at Law,

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Fairbanks, Alaska,

Attorneys for Defendant and Appellee.

In the District Court for the District of Alaska,
Fourth Division, Territory of Alaska

No. 7728

EARL G. ARONSON, Administrator of the Estate
of Flora Ritta Mae Aronson, Deceased, for the
benefit of the said Estate of Flora Ritta Mae
Aronson and Earl G. Aronson, surviving hus-
band, and Earlene A. Roberts, Betty C. How-
ard and Earl G. Aronson, Jr., surviving chil-
dren of said decedent, Plaintiff,

vs.

GEORGE A. McDONALD, Defendant.

COMPLAINT

Now Comes the Plaintiff above-named and, for
cause of action against the Defendant above-named,
complains and alleges as follows:

I.

That the Plaintiff is the duly appointed, qualified
and acting Administrator of the Estate of Flora
Ritta Mae Aronson, Deceased, and that Letters of
Administration upon said estate have been issued
to him out of, and under the seal of, the Probate
Court for Fairbanks Precinct, Fourth Judicial Di-
vision, Territory of Alaska, on the 5th day of Octo-
ber 1953, a certified copy of which letters is attached
hereto and made a part hereof; that Plaintiff has

been duly authorized and directed to file this claim on behalf of the said estate by the said Probate Court by an order heretofore entered in said Probate Court.

II.

That the said decedent, Flora Ritta Mae Aronson, left as her sole surviving heirs at law the following:

Earl G. Aronson.....	Husband
Earlene A. Roberts.....	Daughter
Betty C. Howard.....	Daughter
Earl G. Aronson, Jr.....	Son

III.

That on the 30th day of July, 1953, the said Mrs. Aronson, now deceased, was riding as a passenger in an automobile owned by the Defendant, George A. McDonald, and which automobile was being operated by Mrs. Naomi McDonald, the wife of the said Defendant, on the Richardson Highway between the Copper Center Roadhouse and Valdez, Alaska, and which automobile was proceeding in a southerly direction toward Valdez, Alaska. At about the 57-Milepost on said Richardson Highway, out of Valdez, Alaska, the hydraulic brakeline of the said automobile broke, and all of the brake fluid was lost, leaving the automobile without adequate brakes.

IV.

In addition to the Plaintiff's intestate, there were in said automobile at said time, Mrs. Dickerson, Mrs. Andy Hall, and George A. McDonald, Jr. That after the break in the hydraulic line, the Plain-

tiff's intestate and Mrs. Dickerson wanted to have the damage repaired and wanted to come home to Fairbanks; however, Mrs. McDonald insisted upon proceeding toward Valdez, and in attempting to cross Thompson Pass, about twenty (20) miles from Valdez, the automobile started down a long grade and, without brakes, gained momentum and could not be stopped; the said automobile left the highway, going at a terrific rate of speed, and turned over several times. The Plaintiff's intestate, Mrs. Andy Hall and Mrs. McDonald were killed in said accident.

V.

That the automobile in question was a 1953 Dodge V-8, bearing Alaska License No. 40758, and was owned by the said Defendant and was being operated by the Defendant's wife at the special instance and request and with full consent of the said Defendant, the owner of said automobile as aforesaid.

VI.

That the foregoing accident was caused by the careless and negligent operation of the Defendant's automobile by the Defendant's wife, and that the death of the Plaintiff's intestate was caused solely by the negligence of the Defendant's wife and without any negligence on the part of the Plaintiff's intestate.

VII.

That by reason of the said death of the Plaintiff's wife and intestate, as aforesaid, the said Plaintiff and his children have been deprived of the

society, services and comfort of their wife and mother, to the great loss and damage of the said Plaintiff in the sum of Fifteen Thousand Dollars (\$15,000.00).

Wherefore, the Plaintiff prays judgment against the above-named Defendant in the sum of Fifteen Thousand Dollars (\$15,000.00) together with reasonable attorney's fees and costs.

/s/ MAURICE T. JOHNSON
Attorney for Plaintiff.

Duly Verified.

In the Probate Court for Fairbanks Precinct,
Fourth Judicial Division Territory of Alaska

No. 1647 Probate

In the Matter of the Estate of FLORA RITTA
MAE ARONSON, Deceased. EARL G. ARON-
SON, Administrator.

LETTERS OF ADMINISTRATION

Territory of Alaska
Fourth Division
Fairbanks Precinct—ss.

To All Persons To Whom These Presents Shall
Come, Greeting:

Know Ye, that it appearing to the Commissioner of the above Fairbanks Precinct, Fourth Division, Territory of Alaska, that said Flora Ritta Mae

Aronson has died intestate, leaving at the time of her death property in this Territory, such Commissioner has duly appointed Earl G. Aronson to administer the Estate of Flora Ritta Mae Aronson, Deceased. This, therefore, authorized the said Earl G. Aronson to administer the Estate of Flora Ritta Mae Aronson, Deceased, according to law.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of this Court this 5th day of October, 1953.

[Probate Seal]

/s/ LaDESSA NORDALE

United States Commissioner and Ex-
Officio Probate Judge

Certification Attached.

[Endorsed]: Filed October 7, 1953.

[Title of District Court and Cause.]

ANSWER

Comes Now defendent, and for his answer to the complaint of plaintiff, admits, denies and alleges as follows:

First Defense

That the complaint of plaintiff fails to state a claim against defendant for which relief can be granted.

Second Defense

I.

Defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Defendant has no information as to the allegations contained in paragraph II of plaintiff's complaint sufficient from which to form a belief and therefore denies the same.

III.

Defendant admits the allegations contained in paragraph III of plaintiff's complaint, except said brakeline broke about 57-Mile post on said Richardson Highway; and affirmatively alleges that such damage occurred about 70-Milepost on said highway.

IV.

For answer to paragraph IV of said complaint defendant denies that plaintiff's intestate and Mrs. Dickerson wanted to have the damage repaired and wanted to come to Fairbanks, and denies that Mrs. McDonald insisted upon proceeding toward Valdez.

V.

For answer to paragraph V of said complaint defendant denies that his automobile was being operated at his special instance and request; and affirmatively alleges that said automobile was then being used by his wife with his permission for her own personal pleasure and that of her friends and guests.

VI.

For answer to the allegations contained in paragraphs VI and VII of said complaint defendant denies the same and the whole thereof.

Third Defense

That the accident, injuries, death and damage complained of were due to and caused by the fault, carelessness and negligence of the deceased, Flora Ritta Mae Aronson, in this:

a) That deceased, defendant's wife and others were using defendant's automobile, voluntarily, for a pleasure trip jointly undertaken by deceased, Mrs. Dickerson, Mrs. Andy Hall, and George A. McDonald, Jr., for their own amusement; and as a consequence had journeyed from Fairbanks to Anchorage, thence to Seward and return to Anchorage. While enroute from Anchorage on the return trip to Fairbanks, it was agreed that the party also take a side trip to Valdez.

b) That shortly after leaving the Glenn Allen Highway on the side trip to Valdez, and at a point about 70 miles north of Valdez the car struck a rock on a piece of road under construction, rupturing a hydraulic brake fluid line, causing the loss of all brake fluid, and leaving the car without effective foot brakes. That the automobile was there stopped; and driven onward by defendant's wife only after passing motorists advised that repairs could be made at 57-Mile Roadhouse located 57 miles north of Valdez, and with the concurrence

and consent of the entire party, including Mrs. Aron. That at that point Mrs. Aronson could have left said vehicle.

c) That the party then proceeded to said 57-Mile Roadhouse at which point they stopped and were advised that the repairs required could not be there made, nor at any place closer than Valdez. That none of the persons in the party had been to Valdez or had any personal knowledge of the terrain ahead. That they were told at said roadhouse that they had "passed the worst part" of the road. That the party proceeded toward Valdez with the concurrence and consent of all, including Mrs. Aronson. Mrs. Aronson could have left said vehicle at this point also.

d) Some 15 miles later mountain country was encountered, and Mrs. McDonald was permitted without objection to proceed at night, in fog often dense, and ascend a steep mountain pass. That the party stopped on the summitt of said pass, called Thompson's Pass, at a point about 25 miles north of Valdez, and there discussed whether to wait out the night and fog or to go forward. It was the decision of those in the party, including Mrs. Aronson, to proceed toward Valdez. No person took exception to this decision. Mrs. Aronson at this point also could have left said vehicle.

e) That several miles closer to Valdez, and on a steep grade, the emergency brake burned out in attempting to slow the vehicle and the vehicle plunged down the slope and off the roadway out of control.

That at all times mentioned in the complaint defendant's wife operated said vehicle carefully, prudently and skillfully, and is and was without negli-

gence, save and except only in the exercise of judgment to proceed with defective brakes; and in this respect Mrs. Aronson knew, or in the exercise of reasonable care should have known, of the hazards of using said vehicle without brakes, but nevertheless voluntarily concurred in such continued operation, and voluntarily went forward with said party. That any negligence on the part of defendant's wife was open, apparent to and known to Mrs. Aronson, prior to said accident, and that she voluntarily assumed the risk of injury resulting from the continued use of said vehicle without brakes, and the methods of operation thereof by defendant's wife. That the acts of Mrs. Aronson, aforesaid, proximately contributed to and caused the accident resulting in her death.

Wherefore, having fully answered the complaint of plaintiff, defendant prays that plaintiff take nothing thereby, that the same be dismissed, and that defendant have and recover of plaintiff his costs and disbursements herein, including a reasonable attorney's fee.

COLLINS AND CLASBY

/s/ By CHARLES J. CLASBY

Attorney for Defendant

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 25, 1954.

[Title of District Court and Cause.]

TRIAL BY COURT

The plaintiff was represented by Maurice T. Johnson; the defendant by Chas. J. Clasby and Charles Cole.

Mr. Johnson moved the Court for the permission of the Court to amend the complaint herein on Page 3, Paragraph 7, by striking the figures \$15,000.00 and inserting in lieu thereof \$50,000.00, and to amend the prayer by the same amendment as above and presented argument.

Mr. Clasby resisted the Motion.

The Court reserved his ruling until after trying out the matter of negligence liability if the respective counsel agree thereto and counsel stated no objection.

Mr. Johnson presented an opening statement to the Court followed by Mr. Clasby for the defendant.

Earl G. Aronson was duly sworn and testified in his own behalf.

The trial of this cause was continued until 2:00 p.m.

Entered in Court Journal, No. 56, Page 116, Oct. 8, 1956.

[Title of District Court and Cause.]

TRIAL BY COURT—(Cont.)

Came the plaintiff and the respective counsel as heretofore and the trial of this cause was resumed.

The Court having given permission to the plaintiff to reopen his case in chief, Mrs. John Dickerson, previously sworn, testified further for the plaintiff.

The trial of this cause was continued until 2:00 p.m.

Recess to 2:00 p.m.

2:00 p.m.

Came the plaintiff and the respective counsel as heretofore and the trial of this cause was resumed.

James Hutchinson, Jr., previously sworn, testified further in behalf of the plaintiff.

Emmett Potelko was duly sworn and testified for the plaintiff.

The plaintiff rested.

Mr. Clasby renewed his Motion for the dismissal and presented argument on the matter of negligence.

Mr. Johnson resisted the Motion, presenting argument.

Recess to 4:00 p.m.

The Court being fully advised in the premises, it was Ordered that the Motion of the defendant to dismiss be granted and stated his reasoning therein.

It was Ordered furthermore that the Motion of the plaintiff to increase the amount asked as damages be denied.

Entered in Court Journal, No. 56, Page 123, Oct. 11, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly for trial before the above entitled Court without a jury, commencing on the 8th day of October, 1956, the plaintiff being present in person by Earl G. Aronson, and by his counsel, Maurice T. Johnson, and the defendant appearing by his attorneys, Collins, Clasby & Sezdlo, Charles J. Clasby of counsel; and the plaintiff having introduced evidence, and rested; and defendant having moved for the entry of a judgment of dismissal on the law and on the facts; and plaintiff, having been permitted to reopen his case in chief, submitted further evidence and again rested; and defendant having renewed his motion this court ruled as a matter of law that the statutes in Alaska do not prevent the recovery of a husband for the torts of his wife within the scope of the "Family Purpose Car Doctrine"; then examined the testimony of witnesses, the exhibits and being fully advised in the premises, makes the following, pursuant to Rule 52 and 41(b) FRCP:

Findings of Fact

I.

That plaintiff is the administrator of the Estate of Flora Ritta Mae Aronson, deceased. That he instituted this action under authority by the Probate Court having jurisdiction over said estate as non-

inal plaintiff for the benefit of himself as surviving husband and for the benefit of Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., children of decedent.

II.

That on or about the 30th day of July, 1953, plaintiff's intestate was killed in an automobile accident occurring near Thompson's Pass on the Richardson Highway about 23 miles north of Valdez, Alaska.

III.

That at the time of the accident the automobile involved therein was owned by the defendant George A. McDonald. This automobile was then operated by Naomi McDonald. That Naomi McDonald was then the wife of defendant.

IV.

That plaintiff's intestate was then a passenger in said automobile engaged with Naomi McDonald, now deceased, her son, George, Jr., Mrs. Andrew Hall, now deceased and Mrs. John T. Dickerson, in a pleasure trip from Fairbanks to Seward and return via Valdez.

V.

That approximately 50 miles prior to the location of the fatal accident defendant's automobile struck an obstruction in the roadway in such manner as to burst a hydraulic brake line resulting in the loss of all braking control over the automobile except for

a parking brake. This occurred through no fault of the operator.

VI.

The operator of the vehicle then proceeded to drive toward Valdez, Alaska, without brakes, in the nighttime, and on a road unfamiliar to her or to any passenger after consultation with her guests, without objection by her guests and with the consent of her guests, including plaintiff's decedant. That the party stopped at a roadhouse at 57 mile seeking repairs; and again proceeded onward without objection by and with the consent of decedant's intestate. That the party encountered heavy fog and stopped by the road at a point on or near the summit of Thompson's Pass. That again the party proceeded forward without objection by and with the consent of decedant's intestate.

VII.

That the operator of the vehicle encountered a long descent unknown to her and upon which she was unable to control the vehicle with the hand brake. That the hand brake burned out and the vehicle accelerated by gravity on the descent to a speed causing the vehicle to leave the roadway and overturn. That the proximate cause of the accident and the fatal injuries to plaintiff's intestate was the operation of said vehicle without brakes.

VIII.

That said vehicle was in all other respects being

operated by defendant's wife with the exercise of ordinary care; and that defendant's wife was in no other respect negligent.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That defendant's wife, Naomi McDonald, was negligent in operating a vehicle without brakes; and that said negligence was one of the proximate causes of the fatal injuries to plaintiff's decedant.

II.

That plaintiff's decedant was contributorily negligent in continuing to ride in said vehicle so operated without remonstrance or objection, and became a co-adventurer in, or assumed the risk of proceeding in the face of the danger and peril inherent in such operation of said vehicle under the conditions and circumstances, which negligence on her part contributed as one of the proximate causes of her fatal injuries, the same being a peril within the area of the risk assumed.

III.

That defendant is entitled to a judgment of dismissal with prejudice and with costs against the beneficiary plaintiffs Earl G. Aronson, Earl G. Aronson, Jr., Earlene A. Roberts and Betty C. Howard.

Done at Fairbanks, Alaska, this 23rd day of October, 1956.

/s/ VERNON D. FORBES,
District Judge

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 23, 1956.

In the District Court for the District of Alaska,
Fourth Division

No. 7728

EARL G. ARONSON, Administrator of the Estate
of Flora Ritta Mae Aronson, Deceased,
Plaintiff,

vs.

GEORGE A. McDONALD, Defendant.

JUDGMENT

This matter having come on duly and regularly for trial before the above entitled Court without a jury, commencing on the 8th day of October, 1956, the plaintiff being present in person by Earl G. Aronson, and by his counsel, Maurice T. Johnson, and the defendant appearing by his attorneys, Collins, Clasby and Sezudlo, Charles J. Clasby of counsel; and the plaintiff having introduced evidence, and rested; and defendant having moved for the entry of a judgment of dismissal on the law and on the facts; and plaintiff, having been permitted to reopen his case in chief, submitted further evidence

and again rested; and defendant having renewed his motion this court ruled as a matter of law that the statutes in Alaska do not prevent the recovery of a husband for the torts of his wife within the scope of the "Family Purpose Car Doctrine"; then examined the testimony of witnesses, and the exhibits and being fully advised in the premises; and having heretofore caused to be made and filed herein its Findings of Fact and Conclusions of Law, Now Therefore

It Is Hereby Ordered, Adjudged and Decreed that this action be and the same is hereby ordered dismissed with prejudice, and plaintiff take nothing thereby.

It Is Further Ordered that defendant have and recover of Earl G. Aronson, Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr. his costs and disbursements herein to be taxed by the Clerk of this Court in the sum of \$174.00, and an attorney's fee hereby fixed by the court in the sum of \$500.00.

/s/ VERNON D. FORBES,
District Judge

Entered in Court Journal, No. 56, Page 171, Oct. 23, 1956.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 23, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes the Plaintiff above named, by Maurice T. Johnson, his attorney, and under the provisions of Rule 15, Uniform Rules of the District Court for the District of Alaska, effective January 28, 1956, respectfully moves the Court for a new trial upon the following grounds:

1. Insufficiency of the evidence to justify the decision and that the decision is contrary to law.

(a) That Findings of Fact No. VI, VII and VIII are entirely unsupported by the evidence and against the law.

(b) That the Conclusions of Law No. I, II, and III are erroneous and not justified by the evidence or by the law.

2. Errors in law occurring at the trial.

(a) The Court erred in not permitting the admission in evidence of Plaintiff's Identification 5, being a map of the United States Geological Survey, which map was testified to by the witness, Emmet M. Botelho.

(b) The Court erred in disallowing the Plaintiff's motion to amend the complaint to increase the amount of damages claimed.

(c) The Court erred in entering a personal judgment against Earl G. Aronson, Earl G. Aronson, Jr., Earlene A. Roberts and Betty C. Howard for costs when the action was brought by Earl G. Aronson in his official capacity as administrator, and

any judgment for costs should have been against the estate which he represented.

This Motion is based upon the transcript of the proceedings filed herein, upon the deposition of the witness, George A. McDonald, Jr., and upon the memorandum in support thereof filed herewith.

Dated at Fairbanks, Alaska, this 31st day of October, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiff

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 31, 1956.

[Title of District Court and Cause.]

ORDER RE NEW TRIAL

The Plaintiff was represented by Maurice T. Johnson; the defendants by Charles J. Clasby.

A Motion for a New Trial having been filed, Mr. Johnson waived any oral argument, submitting the matter on the Briefs therein.

The Court being fully advised in the premises, it was Ordered that the Motion for a New Trial be denied.

Entered in Court Journal, No. 56, Page 216, Nov. 9, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the above entitled Court, entered in this case on the 23rd day of October, 1956, and from the Order denying Plaintiff's motion for new trial entered by the above entitled Court on November 9, 1956.

Dated at Fairbanks, Alaska this 19th day of November, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 19, 1956.

—————
[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, That we, Earl G. Aronson, Administrator, as Principal and Andrew J. Hall, and Ina B. Tell, as Sureties, are held and firmly bound unto George A. McDonald, Defendant, in the full and just sum of \$1,000.00, to be paid to the said George A. McDonald, Defendant, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of November, 1956.

Whereas, lately at a District Court of the United States for the District of Alaska, Fourth Judicial Division, in a suit depending in said Court, between the plaintiff above named and the defendant above named, a Judgment was rendered against the said Plaintiff above named, and a Motion for New Trial by the Plaintiff having been overruled, and the said Plaintiff having filed in said Court a Notice of Appeal to reverse the Judgment in the aforesaid suit on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Plaintiff above named shall prosecute his appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

[Seal] /s/ MAURICE T. JOHNSON,
Notary Public in and for Alaska. My Commission
expires: 4/17/60.

[Seal] /s/ EARL G. ARONSON,
Principal Administrator

[Seal] /s/ ANDREW J. HALL,
Surety

[Seal] /s/ INA B. TELL,
Surety

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

Andrew J. Hall and Ina B. Tell, being duly sworn, each for himself deposes and says, that he is a freeholder in said District, and is worth the sum of \$1,000.00, exclusive of property exempt from execution, and over and above all debts and liabilities.

/s/ ANDREW J. HALL

/s/ INA B. TELL

Subscribed and sworn to before me, this 19th day of November, 1956.

[Seal] MAURICE T. JOHNSON,
Notary Public in and for Alaska. My Commission expires: 4/17/60.

Examined and Approved:

/s/ VERNON D. FORBES,
District Judge

[Endorsed]: Filed Nov. 19, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Pursuant to the provisions of the Federal Rules of Civil Procedure and of the United States Court of Appeals for the Ninth Circuit, the Appellant herewith states the points on which he intends to rely in this appeal, as follows:

1. The Trial Court erred in disallowing Appellant's Motion to Amend Complaint to increase the amount of damages.
2. The Trial Court erred in refusing the admission in evidence of Appellant's Identification 5.
3. The Trial Court erred in entering judgment in favor of the Appellee, and particularly erred in adopting Findings of Fact Nos. VI, VII and VIII.
4. The Trial Court erred in adopting Conclusions of Law Nos. I, II and III.
5. The Trial Court erred in entering a personal judgment against the Appellant.

Dated at Fairbanks, Alaska this 28th day of November, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 28, 1956.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Pursuant to the Federal Rules of Civil Procedure and pursuant to the rules of the United States Court of Appeals for the Ninth Circuit, the Appellant hereby designates the following parts of the record as those he thinks necessary for the consideration of this Appeal:

1. Complaint.
2. Answer.
3. Plaintiff's Motion to Amend Complaint, October 8, 1956, shown in Journal No. 56, page 116.
4. Deposition of George McDonald, Jr.
5. Transcript of testimony.
6. Appellant's Exhibits A, B, and C, and Identification 5.
7. Order denying Plaintiff's Motion to Amend Complaint to increase amount of damages, entered October 11, 1956, Court Journal 56, page 123.
8. Findings of Fact and Conclusions of Law.
9. Final Judgment.
10. Appellant's Motion for New Trial.
11. Order denying Appellant's Motion for New Trial, November 9, 1956, Court Journal 56, page 216.
12. Appellant's Supersedeas Bond.
13. Notice of Appeal.
14. Statement of Points on Appeal.
15. This Designation of Record.

Dated at Fairbanks, Alaska, this 28th day of November, 1956.

/s/ MAURICE T. JOHNSON,
Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Nov. 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the list below comprises all proceedings in this cause listed on the Designation of Record of the plaintiff and appellant, viz:

1. Complaint.
2. Answer.
3. Motion to amend Complaint contained in minute order of the Trial.
4. Order denying Motion to amend Complaint contained in record of Trial.
5. Finding of Fact and Conclusions of Law.
6. Judgment.
7. Motion for New Trial.
8. Order denying New Trial.
9. Appellant's Supersedeas Bond.
10. Notice of Appeal.
11. Statement of Points on Appeal.

12. Designation of Record.

Appellants' Exhibits "A", "B", "C", and Identification No. 5, in brown manila envelope.

Deposition of George McDonald, Jr., separately bound.

Transcript of Proceedings at Trial, separately bound.

Witness my hand and the seal of the above-entitled Court this 6th day of December, 1956.

[Seal] /s/ JOHN B. HALL
Clerk of Court.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Fairbanks, Alaska, October 8, 1956

Appearances: Maurice T. Johnson, Esq., of Fairbanks, Alaska, Attorney for Plaintiff. Charles J. Clasby, Esq., and Charles Cole, Esq., of Fairbanks, Alaska, Attorney for Defendant.

Before: Honorable Vernon D. Forbes, District Judge.

Be It Remembered, that the trial of this cause was commenced at 10 a.m., October 8, 1956, plaintiff and defendant both represented by Counsel, the Honorable Vernon D. Forbes, District Judge, presiding. [2] *

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: Are the parties and counsel ready to proceed with Civil Cause 7728, Earl G. Aronson v. George A. McDonald?

Mr. Clasby: The defendant is ready.

Mr. Johnson: The plaintiff is ready.

The Court: Is there anything that can be accomplished prior to the calling of witnesses?

Mr. Johnson: If the Court please, before proceeding I should like to move on behalf of the plaintiff to amend the complaint on its face by interlineation on page three in paragraph VII, the last line, strike the words and figures "Fifteen Thousand Dollars (\$15,000.00)" and substitute in lieu thereof "Fifty Thousand Dollars (\$50,000.00)."

Now, as a basis for making this motion, we believe first that the Federal Rules of Civil Procedure—I think Rule 15 covers the matter of making amendments.

The action was brought originally under Section 61-7-3, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 89, Session Laws of Alaska, 1949. This section, in 1955 by the Legislature then convened, was amended again, and this amendment is found in Chapter 153, Session Laws of Alaska, 1955. The amendment relates largely to the amount of recovery; in fact, the first portion of the amended section reads exactly the same except that it provides that the damages shall not exceed \$50,000, and then there is an addendum at the end of the amendment which sets up specifically what may be shown by way of losses in [3] connection with an action for death by wrongful act.

It is our contention that this amendment simply amends a remedial statute; that it does not change any cause of action or does not change any vested right, because damages are not a vested right in either the plaintiff or defendant until after they have been liquidated and found by a definite judgment. In support of our position we would like to call attention to Section 482, 50 American Jurisprudence, page 505, under the general heading "statutes," and under the specific section heading of "Remedial Statutes," and this section provides that:

"A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. Hence, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. To the contrary, statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence [4] of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending."

And there are cases cited in the footnotes on that general statement.

We also wish to rely on a case in the Ninth Circuit, known as *United States v. Standard Oil Co. of California, et al.* The opinion is found in 21 Fed. Supp. 645. This opinion was by Judge Yankwich, in the Southern District of California. It is very extensive and covers this particular subject rather fully. Judge Yankwich's opinion was affirmed by the Ninth Circuit Court of Appeals in 107 Fed. 2d, on page 402. Subsequently a petition for writ of certiorari was filed in the United States Supreme Court, which was denied in 309 U.S. 673, and further a rehearing on this petition was denied (309 U.S. 697).

As we have tried to point out, the matter of assessment of damages or the amount of damages recoverable we feel is simply a matter of remedy and does not constitute any vested right, and that is the gist of the opinion that we have just cited, *United States v. Standard Oil*, and in this instance there was no change in the statute other than that they raised the amount recoverable to \$50,000, and we feel that that does not add to or take away any right that either the plaintiff or defendant may have had previously, and for that reason, while at the time this case was filed the limit was \$15,000, we feel now that it [5] is perfectly proper to amend the complaint to \$50,000.

The Court: Mr. Clasby.

Mr. Clasby: May it please the Court, an amendment such as counsel seeks doesn't come very timely

at the moment of trial; however, pertinent to the merits of his motion, the same problem was considered by this Court in quite detail in the case of *Simmons v. Wien*, wherein a similar motion was made to amend the complaint and was rejected by this Court. At that time there was cited to the Court as authority for the motion the *Standard Oil Case*. The *Standard Oil Case* was by the Court thoroughly examined and rejected as authority for the moving party's contention that this statute is one that can be applied retrospectively.

I do not have before me the brief we submitted in the *Wien* case, but we submitted substantial authority by Courts interpreting the applicability of changes of this sort in wrongful death statutes, and uniformly the Courts held that the wrongful death statute creating new right, one that did not exist, that the statute says \$5,000 or \$10,000, that is the measure of the right that is created by the statute, and when the statutes are changed enlarging the amount, a new right is being thereby created and is applicable only to injuries occurring after the new statute.

I do not recall the facts of the *Standard Oil* case sufficiently to be able to distinguish it for the Court on the facts. I do recall the case sufficiently to note to the Court [6] that the *Standard Oil* case was not a wrongful death statute case. Accordingly, at this moment, and without opportunity by earlier motion to go into it more exhaustively, we rest for our resistance of the motion on the ruling of this Court in the case of *Simmons v. Wien*.

The Court: It is true that this same question has been previously before the Court, and at that time I looked into it carefully and made what I considered to be a proper ruling.

I do not wish to foreclose any additional arguments on the part of counsel and will certainly permit other cases to be shown. I know that the Ninth Circuit Case, *United States v. Standard Oil* was before me at the time I formerly ruled. Whether I was right or wrong in that ruling, I don't know. I have two or three things in mind at this time: first, whether the motion is timely; if it is, whether it is meritorious; and the third proposition that I have in mind may be moot, depending on what develops. I can see no harm to be done to any of the parties if I should reserve the ruling at this time, and I was about to suggest that we might try out the question of liability in the case before us for trial and, if liability is established, then of course the ruling would be very germane.

Do counsel have any objection to trying out the question of liability, restricting all evidence to the question of liability first and, if liability is established, then we can go into damages. [7]

Mr. Clasby: We have no objection to that procedure.

Mr. Johnson: Neither do we, your Honor. However, there is in that connection a deposition which we understand has been mailed from Beaumont, Texas—I believe you said Saturday evening, is that correct?

Mr. Clasby: That is what I understand.

Mr. Johnson: It ought to be here today, and so far as we are concerned, we were represented at the taking of that deposition, although it was taken at the request of the defendant, we were represented and from the indications that we have received from our correspondent in Beaumont we believe that the deposition would be necessary, particularly on the question of negligence and, if that isn't here by the time we are through with such testimony as we have to offer at the moment, why, we would like to be able to hold the matter over until that deposition comes in.

The Court: We can take that up if we come to that point, but are you ready to proceed now and is it agreeable to restrict the evidence first to the question of liability?

Mr. Johnson: Yes, sir.

The Court: Very well.

Mr. Johnson: There are certain matters, however, that we would like to put in the record to begin with which do not bear exactly on the question of liability, such as the appointment of an administrator and things of that sort.

The Court: I think we should attempt to narrow the issues at this time as much as possible. [8]

Mr. Johnson: We have certified copies of the documents upon which we will rely and are ready to offer those:

The certified copy of letters of administration, the certified copy of the order directing him to file this suit, and a certified copy of the death certificate.

Mr. Clasby: We have admitted the allegations in paragraph one.

Mr. Johnson: I realize that, but I do believe that the record, to make it complete, should disclose these matters.

The Court: You may have them marked for identification and show them to opposing counsel for his examination.

Mr. Johnson: Thank you.

Clerk of Court: Plaintiff's Identifications No. 1, No. 2, and No. 3.

(The documents above referred to were marked Plaintiff's Identifications No. 1, 2, and 3, respectively.)

Mr. Johnson: If the Court please, we have Plaintiff's Identification No. 1, which is a certified copy of the death certificate of the plaintiff's intestate.

Mr. Clasby: We have no objection to its admission for the purpose of showing the death of the plaintiff's intestate.

The Court: That is the purpose of your offer, is it?

Mr. Johnson: Yes, your Honor.

The Court: Very well. It will be received for that purpose. [9]

Clerk of Court: Plaintiff's Exhibit A.

(Certified copy of death certificate of plaintiff's intestate was received in evidence as Plaintiff's Exhibit A.)

Mr. Johnson: We would like to offer Plaintiff's Identification 3, which is a certified copy of the

letters of administration showing the appointment of plaintiff as administrator.

Mr. Clasby: We have no objection.

The Court: It may be received.

Clerk of Court: Plaintiff's Exhibit B.

(Certified copy of letters of administration was received in evidence as Plaintiff's Exhibit B.)

Mr. Johnson: We would like to offer Plaintiff's Identification 2, which is a certified copy of an order authorizing the administrator to bring this action.

Mr. Clasby: No objection.

The Court: Very well, it will be received.

Clerk of Court: Plaintiff's Exhibit C.

(Certified copy of order authorizing the administrator to bring action was received in evidence as Plaintiff's Exhibit C.)

Mr. Johnson: Does the Court wish counsel to make an opening statement, or do you prefer to proceed with testimony?

The Court: You may make a brief opening statement. I think I am rather familiar with the theory [10] of both the plaintiff and the defendant, but you may make a brief statement if you wish.

(Thereupon Mr. Johnson made an opening statement to the Court in behalf of the plaintiff.)

(Thereupon Mr. Clasby made an opening statement to the Court in behalf of the defendant.)

Transcript of Testimony of Witnesses

Mr. Johnson: Mr. Aronson, will you take the stand, please?

EARL G. ARONSON

the plaintiff, took the stand in his own behalf, and after being first duly sworn, testified as follows:

Mr. Johnson: If the Court please, it is my understanding that you still wish us to proceed solely on the theory of negligence and to offer no proof at all in the way of damages; is that correct?

The Court: Yes, unless you think that it would prejudice your case in some manner or the defendant thinks so, we will try out the issue of negligence first.

Mr. Johnson: I see no reason why that wouldn't be perfectly permissible and so far as we are concerned we have no objection. The only thing is: should the question of negligence be resolved in favor of the plaintiff, then we would reserve the right to recall the witnesses for such purpose.

The Court: Certainly.

Direct Examination

Q. (By Mr. Johnson): State your name, please.

A. Earl Aronson.

Q. Are you Earl G. Aronson? A. Yes, sir.

Q. The plaintiff in this case? A. Yes, sir.

Q. And I believe you are the duly appointed, qualified and acting administrator of the estate of Flora Ritta Mae Aronson; is that correct?

A. Yes, sir.

(Testimony of Earl G. Aronson.)

Q. Mrs. Flora Ritta Mae Aronson was your wife; is that correct? A. Yes, sir.

Q. I believe she was killed in an accident that happened on or about the 30th day of July, 1953?

A. Yes, sir.

Q. In an automobile owned by George A. McDonald?

Mr. Clasby: To which we object, if the Court please. It isn't the way to prove ownership.

The Court: In view of the objection, I will sustain the objection.

Q. (By Mr. Johnson): Did you know George A. McDonald, the defendant in this case?

A. Yes, sir.

Q. How long have you known him? [12]

A. About six years.

The Court: Mr. Clasby, is that one of the issues, the ownership of the automobile, or is that admitted in the pleadings?

Mr. Clasby: I think it is admitted in the pleadings. My objection was probably a reflex.

The Court: Very well. In other words, can we proceed with the stipulation that the automobile involved at the time was owned by George A. McDonald?

Mr. Clasby: We may.

The Court: Very well.

Mr. Johnson: May we also stipulate that it was being driven by Mrs. George A. McDonald, the wife of the defendant, at the time of the accident?

Mr. Clasby: Yes, we may.

(Testimony of Earl G. Aronson.)

The Court: Very well.

Q. (By Mr. Johnson): After this accident happened, did you have occasion to speak with the defendant, George A. McDonald, concerning it?

A. Yes, sir.

Q. Will you tell the Court when those conversations took place, if you recall? First, did you have more than one conversation with him about it?

A. Yes, sir; we talked several times about it.

Q. Now, will you tell the Court when you had conversations with Mr. McDonald about it? [13]

A. I don't remember the dates, but it was shortly after the accident George told me that—

Mr. Clasby: I object.

Q. (By Mr. Johnson): Just tell as nearly as you can when these conversations took place. Do you remember when the first one took place?

A. I think it was about a week or two after the accident.

Q. And do you recall where that was?

A. Well, I know one was in the Northward Building.

Q. And where in the Northward Building?

A. In his apartment.

Q. Were you living in the Northward Building at the time also? A. Yes, sir.

Q. And Mr. McDonald was also living there; is that correct?

A. After the accident he moved into the Northward Building.

Q. Do you remember who was present at this

(Testimony of Earl G. Aronson.)

conversation that you had about a week or so after the accident in the Northward Building with the defendant, George A. McDonald?

A. His son was there, is the only one that I know of.

Q. And you recall the presence of no one else besides Mr. McDonald and yourself and his son; is that correct?

A. That is correct.

Q. Will you relate to the Court as nearly as you can remember what was said by Mr. McDonald [14] concerning this accident, and what was said by you concerning it?

Mr. Clasby: To which we object, if the Court please, as being inadmissible. In the first place, it is hearsay; in the second place, we can see no basis for admissibility, it being no exception to the hearsay rule. In the third place, it is impossible to determine what conceivable materiality to the question before the Court, negligence, that there could be in the conversation between this man and Mr. McDonald some week or so after the accident happened. It can't be a statement against interest, as a part of the *res gestae*. Mr. McDonald was not driving. He was not at the scene of the accident. I am at a loss as to what is sought to be proved by the plaintiff in this conversation.

The Court: Objection overruled. He may answer.

Q. (By Mr. Johnson): Will you tell the Court, as nearly as you recall, what Mr. McDonald said about this accident and what you said, if anything?

(Testimony of Earl G. Aronson.)

A. I asked George why he let his wife drive the car if she didn't know how to drive.

Q. What, if anything, did he say?

Mr. Clasby: I object to that, if the Court please. I can't see how any answer to that question would be material.

The Court: Overruled. He may answer.

A. As we were talking, he said that his wife [15] didn't know how to shift gears from high range into low range. We talked about the shifting of the gears. I said, if she didn't know how to drive, why did he let her take the car out? He said he didn't think there was any harm in going to Anchorage, driving down the highway, all she thought about was putting it in gear and steering it down the road, and he said he didn't think about her hitting a rock and breaking the brakeline, hydraulic line.

Q. Did you have any other conversation with Mr. McDonald about this same subject after that, that you recall?

A. No, not on that subject. I talked to the boy about it.

Q. But you did not talk to Mr. McDonald?

A. No, sir.

Q. Did you have any information, or did you obtain any information before they left for Anchorage as to how long they intended to be gone or where they intended to go when they left Fairbanks?

A. Yes.

(Testimony of Earl G. Aronson.)

Q. What, if any, information did you have on that subject?

A. My wife said—asked me if I would mind if she would go, if she could go. I said, “No, I don’t mind if you go, but,” I said, “I would rather if you don’t wait,” and she said, “Well, if we leave today we will be back Tuesday or Wednesday.” She said, “We are just going to Anchorage and right back. We want to see some friends there.” I don’t know the lady’s name. It is Poe somebody. That was the lady’s first name. She worked there. [16] And she said, “We will go to Anchorage and come right back.”

Mr. Johnson: Subject to the right to recall this witness later if it becomes necessary, we have no further questions at this time.

The Court: You mean recall him for the purpose of proving damages?

Mr. Johnson: Yes.

The Court: Very well. You may cross examine.

Mr. Clasby: I have, if it please the Court, no questions of this witness relating to the point at issue; however, I would like to get his present address and occupation and the address of the survivors, with the Court’s permission, at this time.

The Court: You may question him about that.

Cross Examination

Q. (By Mr. Clasby): What is your address, Mr. Aronson?

A. 1653 - 252nd Street, Harbor City, California.

(Testimony of Earl G. Aronson.)

Q. Harbor City? A. Yes, sir.

Q. And where are you employed?

A. I am not.

Q. What is the address of Earlene A. Roberts?

A. Her address is 122 Mayes Street, Pryor, Oklahoma.

Q. And what is the address of Betty C. Howard?

A. Her address is Simi, California, Box 263.

Q. And what is the address of Earl, Junior?

A. His address is 1802 Lincoln Avenue, Dubuque, Iowa.

Q. In discussing this trip with your wife before she left, as I understand it, you had no idea that she was going anywhere except to the Anchorage area and back? A. That is correct.

Q. Do you know whether Mr. McDonald had any different idea of what their purpose was?

A. George told me that they were going to Anchorage and come right back.

Mr. Clasby: That is all.

(Witness excused.)

Mr. Johnson: If the Court please, in the absence of the deposition and the fact that our next witness, Mrs. Dickerson, will not be available until after lunch, I request now that we recess until two o'clock and that at that time we hope to go ahead with Mrs. Dickerson.

The Court: Does the defendant have any objection?

Mr. Clasby: No, she drove in, as I understand

it, from Anchorage throughout the night and went to get a little sleep this morning.

Mr. Johnson: Yes, she got in at 6:30 this morning.

The Court: Very well, this case will be continued until two o'clock.

(Thereupon, at 11:35 a.m., a recess was taken until 2:00 p.m.) [18]

Afternoon Session, 2:00 P.M.

The Court: Are the parties and counsel ready to proceed in Civil Cause 7728?

Mr. Johnson: The plaintiff is ready, your Honor.

Mr. Clasby: We are ready.

Mr. Johnson: The plaintiff desires to call Mrs. John Dickerson.

MRS. JOHN DICKERSON

a witness called by the plaintiff, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Johnson): Will you state your name, please? A. Mrs. John Dickerson.

Q. And where do you reside, Mrs. Dickerson?

A. In Palmer, Alaska.

Q. Did you formerly reside in Fairbanks?

A. Yes, sir, until September 1, 1955.

Q. Were you residing in Fairbanks during the summer of 1953? A. Yes, sir.

Q. Did you know Mrs. George A. McDonald that summer?

(Testimony of Mrs. John Dickerson.)

A. Yes, sir, from February, I believe, until July.

Q. And were you acquainted with Mrs. Earl Aronson? A. Yes, sir. [19]

Q. Were you also acquainted with Mrs. Andrew Hall? A. Yes, sir.

Q. And were you acquainted with George A. McDonald, Jr., the son of George A. McDonald?

A. Yes, sir.

Q. And you knew them all during the summer of 1953; is that correct?

A. That is right, yes, sir.

Q. During the summer of 1953, did you and the people I have just mentioned have occasion to take an automobile trip from Fairbanks?

A. Yes, we took a trip by car to Anchorage-Seward.

Q. And will you tell the Court who drove this automobile?

A. Except for about 90 miles, Mrs. McDonald drove the car the whole trip.

Q. About what time did you leave Fairbanks, if you recall?

A. We left on Monday morning about seven o'clock.

Q. And would that have been about the 28th of July, 1953?

A. It was the last week of July of 1953.

Q. Now, will you describe who was in the car and how they were seated when you left Fairbanks, if you recall?

A. I am not quite sure just how we were seated,

(Testimony of Mrs. John Dickerson.)

but I am sure Mrs. McDonald was driving. Mrs. Hall and I, I believe, were in the front seat, and [20] Bobby George and Mrs. Aronson in the back seat.

Q. That was when you left Fairbanks?

A. Yes, when we left Fairbanks.

Q. Where were you planning to go when you left Fairbanks?

A. When we left Fairbanks we planned to visit Anchorage and Seward.

Q. At that time, had anything been said by any of you about going to Valdez?

A. No, not that I recall. That part of the trip wasn't included in our plans when we left.

Q. Did you get to Anchorage?

A. Yes, we did, that night about seven.

Q. And from there you went to where?

A. We spent Monday night in Anchorage and went to Seward Tuesday morning and returned Tuesday afternoon.

Q. Then, where did you go?

A. We spent Tuesday night at Anchorage again and shopped some Wednesday morning and left there after lunch Wednesday, to come back to Fairbanks I supposed.

Q. That would be about the 30th of July; is that correct?

A. I am not sure just exactly the date. It was the last Wednesday in July.

Q. And it was the date of the accident?

(Testimony of Mrs. John Dickerson.)

A. Yes, sir. Well, the accident occurred about 2:30 Thursday morning. [21]

Q. Oh, I see. Anyway, this was just the day before? A. Yes, the last day.

Q. When did you first hear any discussion about going to Valdez instead of directly to Fairbanks?

A. Between Anchorage and Palmer we discussed going to Valdez and dropped in for a visit with the Baptist Minister in Palmer and we discussed it at his home there.

Q. Was Mrs. McDonald there?

A. Mrs. McDonald and I were the only two that went to visit with Mrs. and Reverend Richey.

Q. What, if anything, was said by Mrs. McDonald or Reverend Richey or you regarding this proposed side trip to Valdez?

A. We were thinking, at least Mrs. McDonald and Mrs. Hall were interested in going to Valdez and when Mrs. McDonald and I went in to see Mr. Richey some remark was made and he said that he wouldn't advise going since they were working on the road, it was under construction. They had been there just the past Sunday and it wasn't very travelable.

Q. And he advised against going down there?

A. Mrs. Richey, in particular, said she wouldn't advise a trip to Valdez.

Q. After that visit, did you proceed on toward, well, the direction of Fairbanks?

A. Yes, we left Palmer and came up the [22] highway, the Glenn Highway.

(Testimony of Mrs. John Dickerson.)

Q. The Glenn Highway? A. Yes.

Q. How were you seated in the car at that time, do you recall?

A. No, I don't recall how we were seated. We changed seating at Meekins. I believe we stopped there. We stopped there for sandwiches and cokes and we changed seating to Mrs. Aronson and me in the back and Mrs. McDonald driving, Mrs. Hall in the center, and Bobby George, Junior, on the right front.

Q. And there were three in the front seat after you left this eating place? A. Yes.

Q. And you and Mrs. Aronson in the back?

A. Yes, sir.

Q. What side were you sitting on?

A. I was behind the driver on the left.

Q. When you reached the junction of the Glenn-Allen Highway and the Richardson Highway, were you still seated in that position, that is, all of the people in the car?

A. Yes, sir, we were still seated that way.

Q. Did you stop at that intersection?

A. Not to a standstill. We had discussed just before the turnoff whether or not we wanted to go to Valdez and Mrs. Aronson said: no, Mr. Aronson had recently lost his father and she would like to go back to Fairbanks. I said I was homesick and [23] wanted to see my two children and I wanted to come back; then each one stated his desire, and the other three wanted to go to Valdez, so there was no stopping there at the Valdez junction. Mrs.

(Testimony of Mrs. John Dickerson.)

McDonald there turned to the right and we started toward Valdez.

Q. That was by reason of the fact that a majority in the car had voted to do that, so to speak?

A. Yes.

Q. Now, will you describe, after you turned to the right, or I suppose it would have been to the right and south—at this junction you proceeded on toward Valdez on the Richardson Highway; is that correct? A. Yes, sir.

Q. Had any one of you ever been over that road before?

A. No, we hadn't but we didn't realize that until a little while later.

Q. And none of you knew anything about the road at all, in other words, from personal knowledge? A. No, sir.

Q. After you turned toward Valdez, will you describe to the Court generally what happened or what took place?

A. Well, as the Minister in Palmer had told us, the road was under construction. The righthand side of the road was dug up. The lefthand side was fairly passable; you could travel it fairly easily; and we traveled, of course, on the good side of [24] the road until we met a pickup truck at about Mile 42. Mrs. McDonald turned right on the travelable part of the road to let the car pass and she hit a large rock boulder. It made quite a noise under the front end of the car and we smelled this peculiar odor and so Bobby George, Junior, got out and came back.

(Testimony of Mrs. John Dickerson.)

Q. Did you stop then?

A. We were stopped on top of the boulder. The car couldn't pass over the boulder; in fact, I don't know how we got over. I believe she did eventually "skrug" over the boulder but the brake fluid had all run down. At that time she had no floor brake at all.

Q. You knew the foot brake was out of working order?

A. Yes, we knew we had no floor brake at the time we hit the boulder; however, the man in the pickup did tell us if we would go to about Mile 57 there was a place that might be able to fix the brake.

Q. Was that ahead of you?

A. Yes, sir; that was approximately fifteen or so miles.

Q. Beyond where you were?

A. Beyond where we were, yes, sir.

Q. Did you proceed on toward this point?

A. After a few minutes' hesitation, we did.

Q. Was there any discussion at that point about going ahead?

A. Not from the whole group. Mrs. McDonald [25] and I were out of the car to ask the driver of the pickup and she debated somewhat to herself about going on but there was no further discussion; however, it was clear that the two of us did not want to go, Mrs. Aronson nor I.

Q. But the other three did indicate that they wanted to go?

(Testimony of Mrs. John Dickerson.)

A. Not at that particular point, it wasn't discussed, but it had already been decided and we all knew how each one felt, but it wasn't discussed at that point.

Q. Will you tell the Court what happened after that, if anything? You continued on for about fifteen miles?

A. We went on to the place at about Mile 57 and the manager, we supposed, came to the car after Mrs. McDonald stopped.

Q. What sort of a place was this gas station or whatever it was?

A. There was a gas tank. There was gas available, and I understand that there is an eating place inside.

Q. Was it a roadhouse, did you know? Did they have sleeping facilities, too?

A. I am not quite sure, but I think they did. I wasn't familiar with it and I still am not. We went over the road once and I can't place the place now, but I know they had gas and eats and I believe that it did have a sleeping place.

Q. Would you and Mrs. Aronson have been able to take accommodations there? [26]

A. I would not have and I don't know Mrs. Aronson's financial condition, but I could not have taken a place. I was a guest on the trip.

Q. Was Mrs. Aronson a guest also?

A. Yes, sir.

Q. What, if anything, did this man say to you or to Mrs. McDonald, if you recall?

(Testimony of Mrs. John Dickerson.)

A. Yes. Mrs. McDonald asked him if he could fix the brakeline, and he said no, he didn't do mechanical work but that she had come over the worst of the road and why didn't she go over to Valdez using the emergency, so we did, or Mrs. McDonald took his advice.

Q. And you went on?

A. And she went on.

Q. Incidentally, about what time of day was it, or evening?

A. It was about 8:30 in the evening, 8:30 p.m., when we hit the boulder, and when we reached the stop at about Mile 57 it must have been 9:30 or more, for our traveling was slow from the time we lost the brakes until we got there.

Q. That would have been in the evening; is that correct? A. Yes, sir.

Q. Was it light or dark or was it getting dark?

A. It was getting dusky dark. [27]

Q. Do you recall the condition of the weather?

A. It had been clear on the trip that day. The weather was good but it was beginning to get a little cloudy overhead in the evening.

Q. Was there anything else that might have impaired the vision?

A. Not that particular time of the journey, but later on at the time of the accident the fog was thick, very thick.

Q. Will you tell what happened after you left this roadhouse, gas station, or whatever it was?

(Testimony of Mrs. John Dickerson.)

A. We took a detour part of the way after we left this Mile 57.

Q. Was that due to the construction of the road?

A. Yes, sir. I am not familiar now with the detour but it took us through the woods quite a bit and my recollection was of wild forest, animals, and I was a little bit afraid as to what might happen to us if the car would stop, but she went on until we started up this mountain, and it seemed a long way up to me, and just as we got to the top or near the top I was unable to see the lights shining to hit the road even through the fog enough to see where we were going. Of course, I was in the back seat, but Mrs. McDonald had trouble, so I asked if we could stop. My intentions were to stop until the fog lifted, and it seemed to be agreeable with everyone to stop. Then after we had, and being a minister's wife and familiar with [28] what prayer could do, I asked if we could have prayer, ask God to help us, so we did, and each one led that prayer.

After we waited just a few moments, Mrs. McDonald thought she could see clearer, so she decided she would go on, and it was just a short time then until we reached the top of the mountain. You could tell when you reached it. It was just a few minutes.

Q. Will you tell what, if anything, you saw Mrs. McDonald do with respect to driving the car or what——

(Testimony of Mrs. John Dickerson.)

A. As we have discussed already, or as I have told you, she was using the emergency for all stopping and slowing down, and when we went over the top I was leaning up close behind her, because I was apprehensive and I noticed we went over the top of this mountain at about 20 miles an hour, and as she started down the other side the car was rolling at faster than twenty. It picked up speed and she reached for the hand brake and pulled it up about half way to slow the car down, and when she started up with the hand brake I smelled it burning and so did everybody else, and she kept putting the brake all the way up to stop it and it didn't even check the speed at all, the burning was worse and worse, and when she realized she wouldn't be able to stop with the hand brake she tried to get the gear—it was an automatic shift—she was trying to get into a gear. Sometime from the time she went over the top until she tried again the gear had gotten into neutral and she couldn't—the car was going maybe [29] forty-five miles—I would estimate about forty-five miles when she started trying to get the car in low or mountain—one of the gears. She couldn't get the gear in, so she wrestled with that, but she never was able to get it from neutral into gear, so we free-wheeled.

Q. On down the line?

A. On down the line.

Q. Did the hand brake hold at all?

(Testimony of Mrs. John Dickerson.)

A. Not at all, no sir. At least, the police reported later that it did not.

Q. You have no particular recollection of what happened after you ran off the road?

A. Yes, I remember it seemed like a long, long time going down the mountain, and finally we came down out of the fog, but the car was going at such a rate of speed that I couldn't see anything but swishes that went by the window, and the last thing I remember, the car, she tried to make the curve—you could tell she was trying to make a curve and the car hit on the right side and I heard Bobby George scream, and we were told it caught his arm then, and I don't remember anything, after the car hit on the side, it slid for a little ways down the road until of course——

Q. You were rendered unconscious in this particular collision or crash, were you?

A. Yes. I don't remember anything after the [30] car slid until I regained consciousness afterwards.

Q. Were you in the hospital then?

A. No, we were all thrown clear of the car before it hit a big boulder beside the road and bounced back down, and when I regained consciousness I was sort of crawling up the side of the mountain toward the highway, back up toward the highway.

Q. Did you see anyone else?

A. Yes. I heard Bobby George crying. I reached back with this hand to see where he was, and he

(Testimony of Mrs. John Dickerson.)

was just at the end of my hand. I could feel him and he would call and then I would call him and he would answer maybe once and the next time he wouldn't, so I knew he was drifting back and forth from consciousness to unconsciousness. Although my back was somewhat injured, I crawled to the top of the cliff and looked up the road and right at the curve she was trying to make I saw Mrs. McDonald and Mrs. Hall and I could tell that Mrs. Hall's head was off and that Mrs. McDonald wasn't living. I am a nurse. I was going up to help them, but I knew it was no use.

Q. All of the time that you were traveling toward Valdez was there much traffic coming from the opposite direction, do you recall?

A. No. We had quite a number of cars at 42 Mile—quite a number of cars passed by when we were stopped there, but after that we saw just a little traffic, just the Road Commission tractors, that I remember. [31]

Q. I believe you stated when you stopped just before going over Thompson Pass—incidentally, you have learned since that this divide you were crossing was Thompson Pass; is that correct?

A. Yes. I didn't know at the time where we were.

Q. But it was a long mountain road, as you have described it?

A. Yes, and of course I have to take the Territorial Police's word for it afterwards that we went approximately 3½ miles down a 45-degree decline.

(Testimony of Mrs. John Dickerson.)

Q. At this point where you stopped just before you went over the Pass, was there anything to prevent your staying there for a while? Were you in such a position that you could have stayed there? You indicated in your testimony that you wanted to stay there. Was there anything to prevent that, that you could see?

A. I am not quite sure. I believe that it was Mrs. McDonald's opinion that we were blocking the road in the particular way we were parked and we weren't sure whether there would be trucks coming or going, so she decided to go on.

Q. Did you have your lights on?

A. We had lights on but they weren't very penetrating through the fog.

Q. Did any truck or tractor come while you were stopped? A. No, sir. [32]

Q. Do you recall passing any truck or tractor or automobile or vehicle after you proceeded over the Pass and down?

A. No, we didn't. The next car I saw was when I crawled up the side of the mountain and got to the road. As I was crawling I saw some lights coming way down the road. It was my idea, in that particular condition, that I must get up there and flag them down and let them know there was a wreck. That was what I was trying to do, and there were three service men; one stayed and two went back to Valdez and called emergency help, and then a bus in the meantime came by going to Valdez, which picked up Bobby George and me.

(Testimony of Mrs. John Dickerson.)

Q. And took you into town?

A. And took us into Valdez. I couldn't find Mrs. Aronson, though, when I was looking, and didn't know until after I was in the hospital an hour or so that she was still up at the wreckage pinned under the car.

Q. I believe it is your testimony, is it not, that so far as you and Mrs. Aronson were concerned you did not desire to go to Valdez and did not actually consent to it?

A. That is my testimony.

Mr. Johnson: You may cross examine.

Cross Examination

Q. (By Mr. Clasby): Mrs. Dickerson, as I understand it, you wanted to come home to Fairbanks in preference to taking the side trip to Valdez? A. Yes, sir. [33]

Q. But after having had the discussion several miles before reaching the intersection of the Glennallen and the Richardson Highway and after learning that the choice of the other three was to go to Valdez, you made no further remonstrance?

A. No, I didn't make any further remarks as to my disagreement.

Q. And as to Mrs. Aronson, do you recall her making any further remark?

A. Not an opposing statement as such.

Q. Then, on your direct testimony, you spoke again about you and Mrs. Aronson's attitude toward proceeding to Valdez after the brakes had

(Testimony of Mrs. John Dickerson.)

been lost on the car, and I didn't get that too clearly. Did you mean that your attitude then was the same as it had been prior to coming to the intersection, or did you form a new concept?

A. No, it was the same. We were agreed that we didn't want to go, but we didn't make any other opposing remarks after the majority decided to go, but we just had a fellowship of disagreement somewhat, so we stayed together in the back seat the rest of the trip.

Q. But that had nothing to do with the vehicle itself being driven after the brakes had failed? [34]

A. Our feeling about it had nothing to do with it. I would say no.

Q. Because had the car been turned around and driven towards Fairbanks it would have been no different than in going on towards Valdez?

A. I wouldn't have agreed to going any further back than Glennallen Garage. That was my personal feeling, that that was the wise thing to do, but being a guest on the trip I didn't express it.

Q. Did you express that?

A. No, I didn't. As I say, as a guest I expressed my opinion one time and I didn't continue to, but my opinion and my desire was to go back to Glennallen Garage, which was only 42 miles.

Q. I believe that there was another place even closer than that on the back of the trail. Do you recall that?

A. I was very unfamiliar with the Territory

(Testimony of Mrs. John Dickerson.)

and so was Mrs. Aronson and all the occupants of the car.

Mr. Clasby: Would the Court excuse me a minute?

The Court: Certainly.

Q. (By Mr. Clasby): I think I have the name correctly, but it is a rather strange one, Tazlina Lodge and Tazlina River, do you recall passing that at about Mile Post 79 or 80 from Valdez?

A. No, I don't. I don't know just the course [35] of that detour at that particular time and I don't know whether we were on the detour at that time, but I don't remember passing it.

Q. It would be, I suspect, the only reasonably large bridge that you would have crossed after having left the Glennallen junction prior to the accident.

A. I just don't recall that.

Q. You didn't stop there on the way down?

A. No, we didn't.

Q. So you have no knowledge of the accommodations?

A. No, sir.

Q. Did you people have a "Mile Post" with you on the trip?

A. I don't remember having a "Mile Post."

Q. Or a map of the highway showing the places along the highway?

A. I don't recall. The driver might have had, but I don't remember it.

Q. Then, when it was proposed that the vehicle be driven after the brake fluid had drained out and

(Testimony of Mrs. John Dickerson.)

there were no brakes on the car, did you voice any objection to the car being driven?

A. No, I didn't.

Q. Did Mrs. Aronson, in your hearing?

A. No. We both realized we would have to get it fixed if we were going to get back home, but it was my thought that we probably would go to Mile Post 57, since that was recommended to us by the man in the pickup. [36]

Q. Was there any discussion, as you recall, between the people in the car relating to the danger of operating it without brakes?

A. No. I was well aware of the danger to some extent, but there was very little I really could do about it.

Q. Do you recall the mile from Valdez that is the summit of Thompson Pass?

A. My understanding was that it was 21 miles on this side of Valdez that the wreck occurred. I don't remember the mileage.

Q. That would, then, make Thompson Pass about 24 miles north of Valdez; is that right?

A. Roughly calculating, yes, sir.

Q. Had there been any mention of any specific reason for wanting to go to Valdez?

A. Yes, there had been. It was to prolong the trip, in behalf of Mrs. Hall.

Q. Sightseeing, or was there a church affair in Valdez? A. It was sightseeing.

Q. Wasn't a church affair going on at Valdez that you know of? A. No, sir.

(Testimony of Mrs. John Dickerson.)

Q. You mentioned that when you stopped at Mile Post 56 that you didn't feel, as a guest, that you were in a position to get out of the vehicle, [37] and stay there. I couldn't quite grasp your meaning. Was it because you didn't have the money to pay for accommodations?

A. Yes. I wasn't financially able, myself. I couldn't speak for anyone else.

Q. Were you merely embarrassed about asking for a loan or wasn't it possible to get a loan from anyone else?

A. I was embarrassed. I don't know the financial situation of anyone else in the car.

Q. Did it impress you that it would have been a sensible thing to do, however?

A. Had I had any idea of the consequences of the trip, I suppose I would have taken the chances of being eaten by wild animals rather than—

Q. It did occur to you when you were at 56 Mile that it would be sensible for you to get out there and stay?

A. We were aware of the danger, but I did not entertain the idea of leaving the party. I was with them, I had been invited, and I didn't particularly entertain the thought at all of leaving the party. At this point Mrs. Aronson and I asked Mrs. McDonald to let's stop and have pie because we had heard they served good pie there, and she didn't care for pie so we went on.

Q. Do I understand that throughout this trip you were the guest of Mrs.—all the people in the

(Testimony of Mrs. John Dickerson.)

car were the guests of Mrs. McDonald to the extent [38] that Mrs. McDonald paid for the hotel and other accommodations, the gas, oil and meals, and so on?

A. It was my understanding that we were guests of Mrs. McDonald and Mrs. Hall combined, for they had planned the trip already.

Q. And those two ladies took care of the expenses?

A. They did of mine, except for several meals Mrs. Aronson insisted on paying my ticket herself, but other than those meals Mrs. Hall and Mrs. McDonald financed the trip, so far as I know.

Q. Do you believe from your experience that on this trip Mrs. McDonald was a reasonably careful and cautious driver?

A. Well, I hesitate to mention it, but no, I had not felt too safe from the first day, because she did take her half of the middle of the road even on the mountains around Anchorage and I was already tense.

Q. In any other respect, did she evidence carelessness?

A. On the trip to Anchorage we almost collided head on around a curve with a car.

Q. How about from the time that the brake fluid was lost on the south?

A. I felt that she was fairly careful, as careful as you could be under the circumstances with her actual handling of the material she had available there.

(Testimony of Mrs. John Dickerson.)

Q. I have no other questions. Just a moment.

By the way, about how long were you parked [39] up on or near the summit of Thompson Pass?

A. I would estimate less than ten minutes. As far as I can recall, it was only a short while.

Q. You mentioned a prayer that each led. Do you mean to themselves, or outloud?

A. No, we prayed audibly, each one. Each one led a short prayer audibly.

Q. Audibly? A. Yes.

Q. Was that just after the decision to go ahead on the mountain?

A. Well, we didn't stop there to discuss whether or not we were going over. The fog was the thing that caused me to ask her to stop. The fog was so thick.

Q. What I mean, however, did you say the prayer after having decided to go forward down the mountain?

A. I am not quite clear about the question. The decision to go, I suppose, was made finally at Mile 57 to go to Valdez.

Q. I am trying just to clear up in my mind some of the time sequences in your direct testimony, Mrs. Dickerson. As I recall it, you mentioned that you stopped at this location very near the summit—Mrs. McDonald did at your request—and that the fog was rather heavy, and after being there for about ten minutes or so Mrs. McDonald [40] thought she could see ahead and it was clear-

(Testimony of Mrs. John Dickerson.)

ing enough so she thought she could go ahead. Also a prayer was said.

What I would like to know: did you say the prayer just after stopping, some ten minutes later talk about going ahead, and finally going ahead, or did you say the prayer after you had decided that it was clear enough to proceed and start to go down the mountain?

A. We stopped, and when we stopped I suggested we have prayer about the remainder of the trip and, after we had closed the prayer, which took a very few minutes—Mrs. McDonald was very tired, you could tell, and so were all the rest of us, and we relaxed and hardly anything was said. After a few minutes Mrs. McDonald said, “I believe the fog has lifted and we will try it a little while further,” because we didn’t know whether we were right at the top or how much further we had to go.

Q. And it was then only a short bit later that you realized you were at the top?

A. Yes, I would say about ten minutes from the time we started until we got off. I don’t recall the time, but it was a short while before we realized we were at the top.

Q. And had started down the other side?

Q. And had started down the other side, yes, sir.

Q. There was then no stop at what you would call the actual summit?

A. I wondered after going over the road since [41] then once if we weren’t actually at the wind-

(Testimony of Mrs. John Dickerson.)

ing part of the road at the summit where we stopped because it was such a short time before we realized we were heading slightly over and down.

Q. At the time you people did stop, you didn't realize you were at the summit?

A. No, we didn't.

Q. Then, when Mrs. McDonald said, "Well, it is clearing a little; I think we can go ahead," did you or anyone else in the car at that time object to going ahead?

A. No, we didn't object at that time.

Q. Specifically with relation to Mrs. Aronson, you did not hear her object to going ahead?

A. No. As I said before, as far as we could tell, we had the road blocked because we stopped right on the tracks. The fog was so thick that you were afraid to turn to either side.

Q. It had begun to clear, as I understand it?

A. Mrs. McDonald thought it had cleared.

Q. So she could tell where she was in the road?

A. She felt she could. I didn't see any change myself.

Q. But you don't recall hearing Mrs. Aronson object to the party continuing at that point, then?

A. No, we didn't verbally object.

Q. As I recall your testimony, when Mrs. McDonald started driving that she was keeping it at around twenty miles an hour?

A. She had tried to maintain that speed after [42] we had the trouble earlier at Mile 42.

(Testimony of Mrs. John Dickerson.)

Q. And it was not until you were picking up speed because of the downgrade that the speed increased over the twenty miles an hour?

A. When we started down the other side, of course, the speed increased.

Q. I direct your attention to the country after the brake fluid had been lost. Was there some rolling country in there?

A. Yes, there had been some rolling country. To my recollection, though, it was not until the latter part that we got into too many hills and mountains.

Q. Had you observed any occasions in this rolling country where Mrs. McDonald would control the speed of the car on the slight downgrade by using the hand brake to keep it within the 20 miles an hour range?

A. Yes, that was her only means of keeping the car in control, or at least braked. That was her only method of braking.

Q. Had you observed her do that several times?

A. Yes, sir.

Q. And it worked efficiently?

A. Yes, it worked.

Q. But on the Valdez side of the summit the hand brake just was not able to control the car; is that right?

A. When she started pulling it up the burning [43] odor occurred and, of course, the harder she pulled the more it burned, so finally the car was rolling at such a speed she realized the hand brake

(Testimony of Mrs. John Dickerson.)

was gone, so she focussed her attention on this gear, trying to get it into mountain gear, the mountain gear of a Dodge 1953.

Q. 1953 Dodge? A. Yes, sir.

Q. Are you familiar with a 1953 Dodge? Have you driven them?

A. Not at that time. I was absolutely unfamiliar with the automatic shift. We had used conventional shift altogether in our family car.

Q. To sum up your testimony, then, as I understand it, at no time, neither you nor Mrs. Aronson objected to the car going on because the brakes were defective?

A. We did not verbally object after we had stated our desire earlier but everyone in the car was well aware of it, I am sure.

Q. Now I have just a little different thing in my mind. I understand you and Mrs. Aronson wished to go to Fairbanks rather than Valdez.

Now I would like to know, just to sum up, neither you nor Mrs. Aronson made any objection to the automobile being driven without brakes?

A. As I recall it, no verbal—we didn't speak our objection. [44]

Q. You may have had mental reservations?

A. We had many desires not to go. My reason was that I was a guest and it wasn't really my decision to make, since I was not financing the trip and it wasn't my car; I wasn't the driver, and so to be socially polite I felt at that time I would let the one make the decision who was doing those

(Testimony of Mrs. John Dickerson.)

things, and I feel sure Mrs. Aronson felt the same way.

Q. But you did that with an awareness of the danger and peril of going forward?

A. I did, personally, I did.

Mr. Clasby: I have no other questions.

Redirect Examination

Q. (By Mr. Johnson): Now, you have said that you made no verbal objection. By the same token you made no verbal consent?

A. No, I didn't, absolutely didn't consent to going on.

Q. And do you believe that if Mrs. McDonald had been a competent driver that she would have been able to put the car in low gear at the top of the hill and used the compression as a brake?

A. Yes, we have learned since that had she known how to accelerate the motor to speed of the wheel, she could have put it in mountain gear.

Q. And she had plenty of opportunity to do [45] that even at the time you were stopped?

Mr. Clasby: We object, if the Court please, to the form of the question. This is counsel's witness; not mine.

The Court: Sustained.

Q. (By Mr. Johnson): Do you believe from what you have stated that Mrs. McDonald had ample opportunity to put the car in low gear as she started to move away from this point of, well, the prayer?

(Testimony of Mrs. John Dickerson.)

A. Yes, she did. I want it clear——

Mr. Clasby: Just a moment. The question is answered and I think she shouldn't go any further with it.

The Witness: May I say from the very peak of the summit?

Mr. Clasby: Just a moment. This may be quite material, and I would prefer that your testimony be in response to a question by counsel.

Q. (By Mr. Johnson): Will you explain what you have in mind or what you thought at the time?

Mr. Clasby: Just a moment. I don't like the witness turned loose. I want to be able to object if it should be irrelevant or immaterial.

The Court: Yes. I think the question should be more definite. I was going to suggest that we go back and read the question and answer and see if she had completed it.

(Thereupon the question and answer were read by the reporter.) [46]

Mr. Johnson: Did you fully answer the question?

The Witness: No, sir. I wanted to explain.

Mr. Clasby: Just a minute. How else can the question be answered except yes or no, and the witness has answered "Yes."

The Court: I think it is true. He may put another question. She has answered the question, "Yes." Do you wish to qualify your answer?

The Witness: No, there was no qualification. It was an explanation. Yes, from the time of the

(Testimony of Mrs. John Dickerson.)

prayer she could have, had she known how, she could have from the summit to the time that the brake burned out.

Mr. Clasby: Just a moment. Now we are getting into a realm of speculation and guessing. I concede that the witness is correct, that a person with a vehicle standing still has an ample opportunity to put it in low gear. She was at the summit and she didn't know she was at the summit.

The Witness: That was what I wanted to make clear.

Mr. Clasby: Beyond the summit, we are getting into speculation.

The Court: I think that is true, but you may proceed by question, answer, and objection.

Q. (By Mr. Johnson): After you reached the summit, what, if anything, could Mrs. McDonald have done at that time with reference to putting [47] the car in low gear, if you know?

Mr. Clasby: To which we object, if the Court please. It has not been shown that this woman had the knowledge from which to make such a guess.

The Court: I thought that was true, Mr. Clasby, but she has been permitted to answer a number of such questions without objection. She said she has had no experience with that type of gearshift.

Mr. Clasby: She said at that time, but she had subsequently learned, but we permitted her to answer questions so the Court and counsel could understand the kind of gearshift employed. We can form our own conception from those answers. Now

(Testimony of Mrs. John Dickerson.)

she is being asked to testify as an expert as to what this woman could have done.

The Court: I sustain the objection.

Q. (By Mr. Johnson): What, if anything, did she do with reference to putting the car into low gear as you went over the Pass?

A. At the very time we reached the summit she was in a gear, because she drove over in a gear, but from the time we were at the summit until the brake was gone she had somehow gotten the gearshift in neutral on the car, and when she reached for the brake, when she pulled the brake all the way up, at that particular time the car was in neutral, because I was watching over her shoulder, as I said before, and it is clearly [48] labeled "neutral, mountain gear" on that gearshift, but after the brake had gone the speed was such that she could not get it from neutral into gear. She tried hard, almost half the way down, to do that, but she wasn't able to, so after a while she cut off the switch and just made no other attempt except to hold the car in the road.

Mr. Johnson: I think that is all.

Mr. Clasby: We have no other questions.

Mr. Johnson: Thank you, Mrs. Dickerson, unless the Court has some questions.

The Court: No, that is all, thank you.

(Witness excused.)

The Court: We will take a ten-minute recess.

Clerk of Court: Court is recessed for ten minutes.

(A ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

Mr. Johnson: If the Court please, due to the fact that I have not had an opportunity to read the deposition which was taken in Beaumont, Texas, and therefore am uncertain as to whether or not I might want to introduce it myself, I am reluctant to rest at this time until I have an opportunity to read it.

The Court: It has arrived, has it?

Mr. Johnson: Yes. It is in the file, if the Court please. It arrived at the Clerk's Office this noon.

The Court: How lengthy is it? [49]

Clerk of Court: 131 pages, your Honor.

Mr. Johnson: And unless it is not agreeable, I would suggest that we recess until ten o'clock tomorrow morning, or earlier if the Court so desires, and then I would have an opportunity to know whether or not I might want to introduce it.

The Court: Does the defendant have any objection to the motion of the plaintiff?

Mr. Clasby: No, I have no objection to him having time to look the deposition over and decide whether he wants to introduce it as a part of his case.

The Court: Very well, the hearing of this cause will be adjourned until ten o'clock tomorrow morning.

Mr. Johnson: Thank you very much, your Honor. May I have leave to withdraw the deposition and take it to my office?

The Court: Do you have a copy of it, Mr. Clasby?

Mr. Clasby: I was supposed to have one but it hasn't arrived yet.

The Court: I am wondering, you will want to examine it, too, I presume.

Mr. Clasby: I got it out of the Clerk's Office and spent my noon hour looking at it. I have gone over about two-thirds of it. If I get my copy, I will let Mr. Johnson know; otherwise, if I could have it about 8:30 in the morning it would probably work out all right with me.

Mr. Johnson: Yes, I will be through with it.

The Court: That is fine and I will permit Mr. Johnson to withdraw it.

(Thereupon, at 3:10 p.m., October 8, 1956, an adjournment in this cause was taken until 10:00 a.m., October 9, 1956.)

Fairbanks, Alaska, October 9, 1956

Be It Remembered, that the trial of Cause No. 7728 was resumed at 10 a.m., October 9, 1956, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

Clerk of Court: Court is now in session.

The Court: Are counsel ready to proceed in Civil Cause 7728?

Mr. Johnson: The plaintiff is ready, your Honor.

Mr. Clasby: The defendants are ready.

The Court: Very well, you may proceed.

Mr. Johnson: If the Court please, the plaintiff feels that the deposition of the defendant's witness,

George A. McDonald, Jr., would be of material help to the Court and for that reason we request that it be read at this time.

The Court: Are there any objections?

Mr. Clasby: I understand that counsel has that privilege under the Federal Rules; however, he makes the witness his witness when he does so.

The Court: And I understand that the offer is [51] in toto; you are offering the entire deposition?

Mr. Johnson: Oh, yes.

The Court: Very well.

Mr. Johnson: Do you want me to read the whole deposition?

Mr. Clasby: Yes. He is your witness, and I have a right to object anywhere along the line.

(Thereupon the deposition of George A. McDonald, Jr., was read into the record by plaintiff's counsel, with the following interpolations during the reading:)

Pages 4 to line 20 on page 17:

“Deposition and answers of George A. McDonald, Jr., witness for defendant, who resides in Jefferson County, Texas, taken on the 4th day of October, A.D. 1956, before me, Odessa J. Smith, Court Reporter and/or Notary Public in and for the County of Jefferson, in the State of Texas, at the law offices of Strong, Moore, Pipkin, Strong & Nelson, at Beaumont, Texas, between the hours of 10:00 o'clock a.m. and 1:30 o'clock p.m. of said day, in accordance with the accompanying agreement of counsel. And the said George A. McDonald, Jr., the witness named in said agreement hereto annexed, personally appeared before me to depose

in said suit pending in the District Court of the District of Alaska, Fourth Division, wherein Earl G. Aronson is plaintiff, and George A. McDonald is defendant; and that I was then and there attended by Howell Cobb, Esq., counsel for plaintiff, and Chas. S. Pipkin, Esq., counsel for defendant; the said George A. McDonald, Jr., being by me first carefully examined, cautioned and sworn to tell the truth, the whole truth and nothing but the truth, touching his knowledge of the matters and things in controversy in said cause, deposes and says as follows, to-wit:

Mr. Pipkin: Now I believe we have a stipulation here to the effect that this deposition may be taken on oral deposition.

Mr. Howell Cobb: Why don't you attach that stipulation or have her make a copy of it?

Mr. Pipkin: Let's let it go back with the deposition. I would like to have the further stipulation that we waive the reading of the deposition and signing by the witness. We are willing to do that since he is our witness, for the purpose of this deposition. Are you agreeable to waiving the signature?

Mr. Cobb: Yes. I don't see how we can do otherwise since it is set next Monday, and of course I don't know whether all of the matters are contained in this stipulation but plaintiff would reserve the right to make all objections other than signature and formalities until the time of trial.

Mr. Pipkin: Let's modify that, except as to leading questions on my part. I would like to, as

to the form of my question to which you think it is leading, you tell me so I may reframe the question, and all other objections be made at the time of trial.

Mr. Cobb: All right, because I don't know whether the rules of evidence are the same in Alaska, I presume so, so I will object to all leading questions, I won't object to all but I will suggest the objection will be made now rather than at the time the deposition is introduced. Actually I don't think that's important, Mr. Pipkin, because this is a trial before the Court, but I will make those objections at this time. Please enter our appearance for the plaintiff, Miss Odessa.

Mr. Pipkin: I understand from the statement in the letter to me that the practice there in Alaska—in this Court in Alaska is governed by the Federal Rules of Civil Procedure in the District Courts of the United States.

GEORGE A. McDONALD, JR.

having been first duly sworn, testified as follows, to-wit:

Direct Examination

Q. (By Mr. Pipkin): I will ask you your name.

A. George A. McDonald, Jr.

Q. George A. McDonald, Jr.? A. Yes, sir.

Q. Mr. McDonald, you speak out distinctly because the nodding of the head or shaking of the head or whatever you do, she can't get that down on paper, so you will have to speak out and not make signs. Now you understand what we are do-

(Deposition of George A. McDonald, Jr.)

ing here, we are taking what is known as your oral deposition, which means that you are now placed under oath which has been administered by the Notary Public, and you understand, do you not, that you are testifying now under oath the same as if you were in Court?

A. Yes, sir, I do.

Q. Have you ever been in Court?

A. No, sir, I haven't.

Q. How old are you? A. Eighteen, sir.

Q. When was your eighteenth birthday?

A. March 16th.

Q. Where do you live now?

A. I am living at 695 Anchor Street, here in Beaumont.

Q. Is that in Jefferson County, Texas?

A. Yes, sir, Jefferson County, Texas.

Q. With whom do you live there?

A. With my aunt, Katy Smith.

Q. How long have you been there?

A. Since 1953.

Q. You have been living there since 1953?

A. Yes, sir.

Q. When were you last in Alaska?

A. Let's see, I believe it was September of 1953.

Q. Where does your father and mother live—
pardon me, your mother is deceased?

A. Yes, sir. My daddy is married again.

Q. And where does he live?

A. He is living at 1195 Washington Boulevard.

Q. What city, town and state?

(Deposition of George A. McDonald, Jr.)

A. Beaumont, Texas, in Jefferson County.

Q. Do you expect to be in Alaska at any time soon? A. No, sir, I don't.

Q. You do not expect to be there, or do you, during the month of October, 1956?

A. No, sir, I don't.

Q. Are you presently, or not presently, in the military service?

A. I am in the military, in the Air Force.

Q. You are now—what is your—are you stationed in Beaumont?

A. No, sir, I am stationed in Loring Air Force Base, Limestone, Maine.

Q. Limestone, Maine, what is the occasion for your being in Beaumont at this time?

A. I am on leave.

Q. And how long have you been here this time?

A. I have been here since the 28th of September, 1956.

Q. Where were you previously stationed?

A. Amarillo Air Force Base, Amarillo, Texas.

Q. When are you destined to report, ordered to report in Maine?

A. The 22nd of October of 1956.

Q. Uh, huh. Now the defendant in this case, Mr. George A. McDonald, is your father?

A. Yes, sir.

Q. Where were you living during the year 1953, where did you reside?

A. We were living in Fairbanks, Alaska.

Q. With whom were you residing there?

A. I was living with my mother and dad.

(Deposition of George A. McDonald, Jr.)

Q. And what was your mother's first name?

A. Naomi—N-a-o-m-i.

Q. Mrs. Naomi McDonald? A. Yes, sir.

Q. Was your father working at Fairbanks, Alaska, at that time?

A. Yes, sir, he was working.

Q. What kind of business was he in?

A. He was in the used car business.

Q. You were how old in October, 1953—were you living there during the whole year in 1953?

A. Yes, sir, I was.

Q. And that was at Nome?

A. No, sir, Fairbanks.

Q. At Fairbanks, Alaska? A. Yes, sir.

Q. In July, 1953, were you a passenger in an automobile in which there was an accident?

A. Yes, sir.

Q. What was the occasion of your being there?

A. Well, we went to Anchorage to see——

Q. Now wait just a minute, let me state it this way, what are the facts with reference to whether or not you made a trip in an automobile with some other people on or about the 30th of July, 1953, or just prior thereto?

A. You mean why did we make the trip?

Q. No, I said did you make one?

A. Yes, sir, I did.

Q. With whom did you make that trip?

A. My mother.

Q. Mrs. Naomi Hall? A. No, McDonald.

Q. Sure, Mrs. Naomi McDonald.

(Deposition of George A. McDonald, Jr.)

A. Yes, sir, and Mrs. Andrew J. Hall.

Q. Mrs. Andrew J. Hall, and who else was in the car?

A. And Mrs. Dickerson, our pastor's wife.

Q. Do you remember her first name?

A. Alvelda Dickerson, and Mrs. Earl Aronson.

Q. Is that A-r-o-n-s-o-n? A. Yes, sir.

Q. Do you know whether she was junior?

A. No, I don't know.

Q. Do you know Mrs. Aronson's first name?

A. Flo—Flo Aronson.

Q. Now how many in number were in the car, now? A. Five, sir.

Q. How many men in the car?

A. Just myself.

Q. You were the only man present?

A. Yes, sir.

Q. And there was your mother, check it and see if I have got it down properly in my own mind, your mother, Mrs. Naomi McDonald, Mrs. Dickerson—— A. Yes, sir.

Q. What did you say her first name was, Flora?

A. No, Mrs. Dickerson's name was Alvelda.

Q. Who was the other?

A. Mrs. Andrew J. Hall and Mrs. Earl Aronson.

Q. Then you say there was a total of five people in the car? A. Yes, sir.

Q. Now, in making this automobile trip, from what point did you leave, from what city?

A. We left from Fairbanks and went to Anchorage.

(Deposition of George A. McDonald, Jr.)

Q. Do you remember the day you left Fairbanks, and if so, what date it was?

A. Well, I will have to think a minute. I believe it was about the 28th of September of 1953.

Q. In whose car did you leave, whose car was it?

A. It was my mother and daddy's car—did I say September 28th?

Mr. Cobb: Uh-huh.

A. I mean July 28th.

Q. You want to make the correction to July?

A. Yes, sir, make the correction.

Q. You started out from what point?

A. We started out from Fairbanks.

Q. From Fairbanks, Alaska? A. Yes, sir.

Q. At what time of day did you start your trip?

A. I couldn't tell you, sir.

Q. You don't recall? A. I don't recall.

Q. Where were you proceeding to, what was your destination? A. Anchorage.

Q. Anchorage, Alaska?

A. Yes, sir. At the time we left Fairbanks our destination was Anchorage.

Q. What kind of car was it?

A. It was a 1953 Dodge, Coronet.

Q. A Coronet, who was driving when you left?

A. My mother.

Q. Where were you seated in the car?

A. By the right front door, in the front seat.

Q. And who was on the front seat besides your mother?

A. My mother was driving, Mrs. Hall was sit-

(Deposition of George A. McDonald, Jr.)

ting in the middle, and I was sitting by the passenger door in the front seat.

Q. You mean by passenger door, the right hand?

A. The right-hand side, yes, sir.

Q. Anyone on the rear seat?

A. Yes, sir, Mrs. Dickerson was sitting on the left side of the car in the back, and Mrs. Aronson was on the right.

Q. Well, you proceeded then from Fairbanks to Anchorage in one day, or what are the facts?

A. Yes, sir, in one day.

Q. And about what distance was that, just an estimate?

A. I would say about 400 miles, approximately.

Q. State whether or not the trip was made all at one time, or in one day?

A. It was made in one day.

Q. Do you know of your own knowledge as to whether or not this trip had any particular purpose, and if so, what was the purpose of the trip?

A. There was a purpose. We were going to Anchorage to see a friend of ours, and we were going to Valdez to a religious meeting.

Q. Had you discussed going to Valdez before you left Fairbanks?

A. I don't know if they had discussed it or not. All I know, when we left Anchorage we were going to Valdez to this religious meeting.

Q. Did you go to Anchorage to attend a religious meeting?

(Deposition of George A. McDonald, Jr.)

A. No, sir. We went to Anchorage to see a friend of ours.

Q. And was it a mutual friend?

A. It was a mutual friend, yes, sir.

Q. What was the relationship of you folks in the car, were you any kin to these people besides your mother?

A. No, sir. They were just friends of ours.

Q. Were they any kin to each other?

A. No, sir.

Q. Who had planned this trip, do you know?

A. Well, no, sir, not offhand. I believe they were all just really talking about going, I don't know who is the one that started talking about the trip.

Q. Was this, or not, a mutual friend you had down there? A. Yes, sir.

Q. Now was there any untoward event, anything out of the ordinary that occurred on the trip from Fairbanks to Anchorage? A. No, sir.

Q. Did you get to Anchorage in the nighttime?

A. We got there, it wasn't quite dark. It was in the late evening.

Q. Did you visit the friends?

A. Yes, sir, we went by and saw her.

Q. Well, where did you spend the night?

A. We spent the night at one of the motels there.

Q. Did you all go in the friend's house and visit with them socially?

A. Yes, sir, we were all good friends.

(Deposition of George A. McDonald, Jr.)

Q. Where had you known this friend?

A. In Fairbanks. She used to work in the church.

Q. You spoke about the church, state whether or not everybody in the car that made the trip from Fairbanks to Anchorage were all members of this same church, if you know?

A. Yes, sir, we were all members of the same church.

Q. What church was it?

A. First Baptist.

Q. Had you all traveled together before?

A. No, sir.

Q. What are the facts as to whether or not you had any car trouble on any part of the car, or engine, or any of the equipment on the car between Fairbanks and Anchorage?

A. No, sir. We had no trouble with the car whatsoever.

Q. Now, when you got to Anchorage, state whether or not you spent the night?

A. Yes, sir, we spent the night, I believe it was the Western Motel in Anchorage.

Q. Now, on the next day, did you visit the friend again?

A. Yes, sir, we went by and saw her again.

Q. And did you have a meal with her?

A. I don't recall that.

Q. All of you stayed together all the time?

A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. Did you separate after you got to Anchorage? A. No, sir, we all stayed together.

Q. Now, state whether or not there was any discussion had in your presence and hearing between all of you people who had made this trip down there, as to whether or not you should return to Fairbanks or proceed to some other city or place?

A. I don't recall any discussion on anything like that, no, sir.

Q. Well, when was it decided, if it was, or was it discussed as to whether or not you should proceed on to Valdez?

A. Yes, sir, we decided we would go on to Valdez from Anchorage.

Q. What was the purpose in going to Valdez?

A. To a religious meeting.

Q. Was there any particular meeting going on there?

A. Yes, sir, it was the Southern Baptist Revival, and we were going down to the meeting.

Q. Now, who entered into, if you know of your own knowledge—did you hear a discussion between the people that made up your traveling party, and that's the people you have named were in your car, coming down from Fairbanks to Anchorage, was the matter discussed generally between you?

A. Not that I know of, sir.

Q. Who made the decision to go to Valdez?

A. They all did.

Q. Well, did you hear any discussion about going to Valdez to this revival?

(Deposition of George A. McDonald, Jr.)

Mr. Cobb: It is understood all my objections to this might be considered hearsay, is that right, sir?

Mr. Pipkin: Yes, sir, that's right, you are not waiving them, if they want to make them up there."

[The following matter is from the District Court Reporter's Transcript:]

After reading through line 20, on page 17 of the deposition:

Mr. Johnson: I haven't renewed any objections of that kind, your Honor, and we are going to go ahead with it.

(Continued reading from line 21, page 17 of the deposition through line 21, page 21, "Mr. Cobb: That calls for a conclusion and hearsay.")

Q. Did you have any discussion with anybody?

A. No, sir, I didn't.

Q. Was it talked over?

A. I didn't say anything about it, I was just on vacation and just going along.

Q. As to the others, did you hear any discussion between them about going to Valdez?

A. Yes, sir, I believe they said something about it.

Q. When you left Anchorage, I will ask you whether or not you had some destination in mind?

A. Yes, sir, when we left Anchorage, we were going to Valdez.

Q. Did you know of your own knowledge that you were going to Valdez? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. Did you understand what they were going for?
A. Yes, sir, I did.

Q. Did you ever reach Valdez?
A. No, sir.

Q. Now, from Anchorage over to Valdez, about how far is it? If you don't know the exact number of miles, give your best estimate.

A. I would say close to 300 miles.

Q. Do you recall what time of day you left Anchorage?
A. No, sir, I don't.

Q. Was it daytime?
A. Yes, sir, it was.

Q. Who was driving?
A. My mother.

Q. And whose car were you in then?

A. We were in my mother's and daddy's car.

Q. Was that the same car you left Fairbanks in?
A. Yes, sir, the same car.

Q. Do you know of your own knowledge anything about your mother's experience as a driver?

A. Yes, sir, she was a good driver.

Q. Do you know how long she had been driving?

A. No, sir, not offhand. I would say, maybe, fifteen years.

Q. Did you drive any on the trip from Anchorage toward Valdez?

A. Yes, sir, I drove for about 30 minutes. That was right after we left Anchorage.

Q. Did anyone else drive the car besides her and you?
A. No, sir.

Q. Now what was the nature of the terrain on the road with reference to whether it was hilly or mountainous from Anchorage over to Valdez?

(Deposition of George A. McDonald, Jr.)

A. We had smooth, flat road up until about 35 miles outside of Valdez.

Q. What highway were you traveling on?

A. The Richardson.

Q. Called the Richardson Highway?

A. Yes, sir.

Q. State whether or not that's the main highway from Anchorage to Valdez?

A. Yes, sir, it is the main road. It is the only road.

Q. Now, did anything out of the ordinary occur to the automobile between Valdez and—as you were traveling towards Valdez, that is, the public highway, the Richardson Highway, between Anchorage and Valdez, I am not referring to the actual accident, I am referring to anything that may have happened before that, something that might have happened before that?

A. Yes, sir, we punctured our brakeline.

Q. What were the circumstances of that?

A. Well, the road was under construction in places, and was so bad in places it called for us to go from one side to the other, and they had a long strip of dirt piled up in the middle of the road, and my mother had to cross that pile of dirt to get on the other side of the road, and she hit a rock and it broke our brakeline, punctured our brakeline.

Q. Did you have occasion to observe where the brakeline was broken?

A. Yes, sir. I thought at first that we had punc-

(Deposition of George A. McDonald, Jr.)

tured our gas tank, so I asked her to stop and let me look.

Q. All right, and what called your attention to the fact that something may have happened, or may not have happened?

A. Because it made a noise, the rock hit mighty hard.

Q. Was the road graded up?

A. Yes, sir, it was graded up and dirt was piled in the middle of the road by a grader.

Q. Was there a crew along working on the road?

A. No, sir, it was late at night.

Q. At the time you speak of trouble with your brake lining, or your brakeline, it was nighttime?

A. Yes, sir, it was approximately midnight.

Q. Do you know what point you were on the road to Valdez?

A. Yes, sir, we were about 57 miles outside of Valdez.

Q. How do you fix that, was the road marked in any way? A. Yes, sir, it has mile posts.

Q. Had you experienced any trouble with the brakes up until that point?

A. No, sir, we had perfectly good brakes until that point.

Q. Is it your testimony you heard a noise like a rock striking under—

Mr. Cobb: That calls for a conclusion and hearsay."

[The following matter is from the District Court Reporter's Transcript:]

(Deposition of George A. McDonald, Jr.)

Mr. Johnson: We will renew that objection, your Honor.

The Court: He may answer.

(Continued reading deposition from line 22, page 21, through line 13, page 76, the last question being: "There wasn't any actual choice as to the passengers about getting out and staying in the middle of the wilderness in the middle of the night, was there?")

“Q. What called your attention to it?

A. Well, the noise of the rock.

Q. Did you get out of the car?

A. Yes, sir, I got out to see if the gas tank was hurt, and there was brake fluid all over the ground.

Q. All right, and you saw it?

A. I saw it, and smelled it.

Q. Are you familiar with the smell of brake fluid? A. Very familiar.

Q. What did you do then, if anything?

A. I walked around to her side of the car and leaned against the window and told her the brake-line was punctured and we didn't have any brake, and she tried the pedal and it went to the floor.

Q. Your mother was driving at that time?

A. Yes, sir, she was driving at that time.

Q. Do you recall on what side of the car the brake fluid seemed to be coming out of it?

A. It was dark and I couldn't see, but the best I could tell by the smell and where the puddle of fluid was, I think I would say it was back close to the left rear wheel.

(Deposition of George A. McDonald, Jr.)

Q. What are the facts, you actually got down and actually examined the brakes, or the hose, or whatever it is?

A. No, sir, I didn't crawl under the car and check it.

Q. These other parties in the car, do you recall whether they were all awake?

A. They were all awake.

Q. How long did you stop there?

A. About five minutes.

Q. State whether or not at that point on the highway, whether or not there were any—was any town, houses or garages, or anything?

A. No, sir, not right in that immediate vicinity.

Q. State whether or not there was any discussion by your mother with you in the car, in the presence of these other people that were in the car, as to whether you should proceed or not proceed?

A. Yes, sir, there was a discussion, and they decided to go on any try to find a place—

Q. Wait a minute, there was a discussion?

A. Yes, sir.

Q. Was it a general discussion between you folks in the car?

A. Yes, sir, it was discussed by everybody in the car.

Q. Did you reach a unanimous decision as to what you should do?

Mr. Cobb: I am going to object to that.

Q. All right, did anyone want to stay there?

(Deposition of George A. McDonald, Jr.)

Mr. Cobb: That would be objectionable, too, Mr. Pipkin.

Q. Did you hear anyone say whether they wanted to stay or they wanted to go on?

A. Yes, sir, they all decided to go.

Mr. Cobb: I object to that as not being responsive.

Q. All right, listen to the question carefully. State whether or not there was any discussion held in the car as to whether or not you would—all of you would proceed from that point forward?

A. Yes, sir, there was.

Q. And to what effect was the discussion—withdraw that. Was there anyone in the car who decided—that wanted to stay there or go forward, or what are the facts?

A. Well, everybody agreed to go on.

Mr. Cobb: I object to that as not being responsive to the question.

Q. I asked was there any agreement reached there between you all. I want to ask you this, was there any agreement reached at that time, you stated you had a discussion about it?

Mr. Cobb: That's leading and suggestive, Mr. Pipkin, and I object to it. You can ask what he heard and I won't object to that.

Q. Was any discussion had in your presence and hearing, after the time the brake fluid was seen on the ground?

A. Yes, sir, there was.

Q. Where was this discussion had?

A. In the car.

(Deposition of George A. McDonald, Jr.)

Q. Between whom?

A. Between all the passengers in the car.

Q. Did you take part in the discussion?

A. Yes, sir, I did.

Q. What did you hear said in there, if anything?

A. Well, I told my mother what happened.

Q. All right, did you tell her in the presence of the other people?

A. Yes, sir, but I told her in a fairly low voice, and when I walked around and got back in the car, they asked what was wrong, and I told them.

Q. State whether or not you made any statement after you got in the car about the condition of the brakes? A. Yes, sir, I did.

Q. State whether or not it was made in a voice loud enough to be heard?

A. I told all of them.

Q. Do you have any recollection at this time as to what any particular person in the car may have said at that time, after you gave them that information?

A. No, sir, I don't recall anyone saying anything.

Q. Now, state whether or not there was any discussion in the car as to whether or not—in your presence and hearing, what did you hear said in the car then, if there was anything said, as to whether or not you should proceed?

A. Yes, sir, we had a discussion on whether we should go ahead or stay there.

Q. Was that had in the car?

(Deposition of George A. McDonald, Jr.)

A. It was in the car.

Q. What was the nature—all right, right on that point, state whether or not anyone in your presence and hearing, stated whether they wanted to leave the car or stay there at that point?

A. No, sir, everybody wanted to stay in the car, and they wanted to proceed.

Mr. Cobb: We object to that as not being responsive to the question.

Mr. Pipkin: Reread that question.

(Question read by the reporter.)

Q. Just answer the question yes or no, or however you want to answer it, but I asked whether there was anyone in the car—read the question. (Question read by the reporter.) Was there any discussion?

A. Yes, sir, there was a discussion, but not on leaving the car or anything like that.

Q. But there was a discussion?

A. Yes, sir.

Q. All right, state whether or not there was any expression, or any talk, or statement made in your presence and hearing there as to whether or not anyone wanted to leave the car or stay there?

A. No.

Q. Did they all stay in the car?

A. Yes, sir.

Q. Did your car proceed? A. Yes, sir.

Q. And how—right along there, what type of road was it, was that a mountainous country or hilly country? A. No, sir, it was flat country.

(Deposition of George A. McDonald, Jr.)

Q. Was anything said in your presence and hearing at the time you left, or before you left this point where you had stopped and found the brake fluid leaking, and you said as to how you would proceed without your brake?

A. Will you go over that again? I don't quite understand that one, sir.

Q. Was anything said about the brakes when you left there, in your presence and hearing, in the car?

A. Yes, sir.

Q. What was said?

A. Well, they decided to go on, and to try to find a place to fix it.

Q. Was your car equipped with any other type of brake?

A. Yes, sir, it had a handbrake, an emergency brake.

Q. Well, did you know, and was it apparent to you, that you had no foot brake? I will put it this way, withdraw that. Do you know whether or not that this leaking of the fluid affected any of the brakes on the car?

A. Yes, sir, definitely.

Q. What did it affect?

A. Didn't have any foot brake at all.

Q. Was the car equipped with any other brake besides——

A. Yes, sir, the handbrake, the emergency brake.

Q. Where was it?

A. It was on the left-hand side of the car, under the dashboard, I believe it was. I can't rightly recall.

(Deposition of George A. McDonald, Jr.)

Q. What are the facts with reference to whether or not any repairs were attempted to be made, or made, at the time you stopped there, when you noticed the brake fluid on the ground?

A. No, sir.

Q. Now, do you recall whether or not you passed along the highway after you started up again, was your mother still driving?

A. Yes, sir.

Q. Was everyone in the seat of the car where they had been, or not?

A. Yes, sir.

Q. Was it daytime or nighttime?

A. It was night, about 12:00 midnight.

Q. About 12:00 midnight, is that the time you estimate you had this break in the line?

A. Brake trouble, yes, sir.

Q. Were you meeting any traffic along the highway?

A. No, sir, none whatsoever.

Q. State whether or not you passed any shops, houses, or anything along the way?

A. We passed nothing, no houses, no garages, no nothing.

Q. What was the first place you came to, if you recall, where there was any house, garage or town?

A. 56-mile lodge.

Q. Can you describe the location, was it a settlement of houses, or a garage, or what was it?

A. No, sir, it was a little barn—it was a little filling station and had some pumps out in front.

Q. State whether or not you observed it was open or closed?

A. It was open.

Q. It was open?

A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not your party, or any of you, got out and went in?

A. No, sir, they all stayed in the car.

Q. Did you get out of the car? A. No, sir.

Q. Did anybody get out of the car at that point?

A. No, sir.

Q. State whether or not you talked to anybody there?

A. Yes, sir, we pulled up in front and this man came out from inside of the place and asked could he help us, and we told him our brakeline was broken and we would like to get it fixed.

Q. Who was he talking to?

A. He was talking to my mother.

Q. Where was he standing, over on the front of the place, or did he come up to the car?

A. He came up to the car.

Q. Was that conversation had in the presence and hearing of the other passengers in the car?

A. Absolutely.

Q. State whether or not the man stated—state what he said with reference to whether it could be fixed there, or not.

A. No, we asked him the question, and he said that he didn't have the facilities to fix it, that the brakeline would have to be pinched off, and he didn't have any facilities to do that with, and the road was good from that point on to Valdez.

Q. Is that 56-mile post, is that the true mileage, it is 56 miles? A. Yes, sir, it is 56 miles.

Q. Did anybody eat anything out there?

(Deposition of George A. McDonald, Jr.)

A. No, sir, we didn't get out of the car.

Q. Had you ever been over that road before?

A. No, sir.

Q. Do you know of your own knowledge—were you familiar with the road ahead? A. No, sir.

Q. And you estimate at that point that you were about 56 or 57 miles?

A. At that lodge we were 56 miles from Valdez. They are marked off.

Q. How far from 56-mile lodge back to where you broke your brakeline?

A. About one mile. It happened about one mile, at the 57-mile road post.

Q. Did I understand you to say—how far did you say it was back from the 57-mile post that you had that accident?

A. You mean that we broke our brakeline?

Q. Yes.

A. We broke our brakeline at approximately the 57-mile post, and drove one mile further to the 56 lodge.

Q. I see. Did you notice any mile posts back there, or are you just estimating that?

A. No, sir, they are marked with mile posts.

Q. Uh-huh. Now, did you then proceed, did you kill your motor or engine there at that lodge, do you remember? A. No, sir, we didn't.

Q. State whether or not any repairs were made on the brakes there? A. No repairs were made.

Q. State the facts as to whether or not anybody

(Deposition of George A. McDonald, Jr.)

asked to get out of the car, in your presence or hearing?

A. No one asked to get out of the car.

Q. State the facts about whether or not there was any discussion in the car about whether you should proceed to Valdez?

A. Well, there was there.

Q. There was a discussion there, what was the discussion?

A. Well, we talked about whether we should stay there or drive on in, because we were told at 56-mile lodge that the road was good to Valdez and that we could drive it without any trouble.

Q. Who told you that?

A. The fellow that came outside.

Q. State whether you know of your own knowledge that that statement of his was made in the presence and hearing of the other people in the car?

A. It was made in the presence of everyone in the car.

Q. Well, then did you proceed to Valdez?

A. Yes, sir, we proceeded on.

Q. And how far, did you have to stop anywhere along after you left the 56-mile lodge?

A. Yes, sir, we stopped one time.

Q. Do you recall for what purpose or what was the occasion for your stopping?

A. There was a road that tied into the road we were on, and there was a barricade there where they had been working on it, and we had to stop and go around it.

(Deposition of George A. McDonald, Jr.)

Q. Did you have occasion to observe how your mother drove? A. Yes, sir.

Q. I am talking about from the 56-mile lodge on forward? A. Yes, sir.

Q. Did you have occasion to observe her driving? A. Yes, sir, I did.

Q. Were you still on the front seat?

A. Yes, sir.

Q. In what manner was she driving?

A. Well, she was driving very slowly.

Q. At about what speed would you say?

A. Approximately 30 or 40.

Q. What was the condition of the road from that 56-mile post, we will say, forward there for a distance——

A. Well, up to about the 52-mile post it was still under construction. Then we hit pavement, hit blacktop.

Q. Now when you made that stop for these repairs, and having to drive around that you have spoken about, how was the car brought to a stop?

A. With the hand brake.

Q. State whether or not you observed there was any difficulty in making the stop?

A. No, sir, it was a good stop. There was no trouble at all. The hand brake was working perfect.

Q. Now, when you left there, did you go on down the road toward Valdez? A. Yes, sir.

Q. State whether or not along there at this point where you made this stop, and from there

(Deposition of George A. McDonald, Jr.)
forward some distance, whether the road was hilly, mountainous, or flat?

A. Well, there were a few hills, some hills that weren't even big enough to notice, and we didn't have any trouble, sir.

Q. Now do you know where Thompson's Pass is on the highway? A. Yes, sir, I do.

Q. Do you recall approaching Thompson Pass?

A. No, sir, there was no signs or nothing, and you couldn't even tell that you were climbing.

Q. But I say, do you recall approaching?

A. Oh, yes, sir, I recall it.

Q. Did you know it was down there?

A. No, sir, we didn't.

Q. Now this was—was it still dark?

A. Yes, sir.

Q. What time of the morning was this getting to be, or at night?

A. It was about 12:30, something like that.

Q. About 12:30 at night? A. Yes, sir.

Q. State the facts with reference to whether or not you finally came to Thompson Pass?

A. Yes, sir, we finally got to Thompson Pass.

Q. Now, state whether or not at the point where Thompson Pass is, the country is mountainous?

A. Yes, sir, it is mountainous at Thompson's Pass. You don't notice it going up like coming from Anchorage to Valdez, you don't even notice that you are climbing.

Q. Well, I will ask you if you noticed whether

(Deposition of George A. McDonald, Jr.)

or not you were climbing a mountain, or going up?

A. No, sir, we didn't notice it.

Q. Did you have any trouble with your car on with your handbrake between the 56-mile lodge and the pass? A. No, sir.

Q. State whether or not you realized, when you got to the pass—if you knew you had arrived at the pass?

A. Yes, sir, because when we got to the top——

Q. You realized it? A. Yes, sir.

Q. What caused this realization?

A. We got up there, and all of a sudden the road starting dropping out from under us, we started going down.

Q. State where or not you were all still in the car? A. Yes, sir, we were all still in the car.

Q. All five of you were in the car?

A. Yes, sir, all five of us were in the car.

Q. Did any of you get out of the car?

A. No, sir.

Q. Were you on top of the pass?

A. We were on top.

Q. State whether or not you knew you were on top of the pass?

Mr. Cobb: I object to that as being leading and suggestive.

Q. Well, where were you when you stopped?

A. We were directly on top of Thompson Pass.

Q. State whether or not—what the facts are, from the point you stopped you could tell the road went downward from that point?

(Deposition of George A. McDonald, Jr.)

Mr. Cobb: I object to that as leading and suggestive.

Q. State whether or not you could tell whether the road went up or down at that point?

A. We could definitely tell.

Q. What did it appear? A. Down.

Q. How did it appear, whether or not a gentle slope down, or a steep slope down?

Mr. Cobb: I object to that as leading and suggestive, and putting words in the mouth of the witness.

Q. State the facts as to whether or not you could tell from looking out the front of your car, you could tell whether or not the road went up or down, upon Thompson Pass?

A. Yes, sir, you could definitely tell.

Mr. Cobb: I am going to object to that as not being responsive. This witness was asked whether he could tell, and his answer is "you could," rather than what the witness, himself, could tell.

Q. Could you tell, yourself? A. Yes, sir.

Q. How did it appear? A. A steep grade.

Q. What are the facts at that point, whether anybody got out of the car?

A. No, sir, we just sat there.

Q. You just sat there? A. Yes, sir.

Q. Was any discussion had in the car as to whether or not you should proceed?

A. Yes, sir, there was.

Q. And what, if anything, was decided in the car?

(Deposition of George A. McDonald, Jr.)

A. They decided that we should hold a prayer meeting right there.

Q. All right, decided to hold a prayer meeting?

A. Yes, sir.

Q. Were you going to pray about it?

A. Yes, sir.

Q. What are the facts as to whether or not there was a prayer meeting held, I mean, a prayer said? A. Yes, sir, there was a prayer.

Q. Was it an outloud prayer?

A. No, sir, everybody did their own praying.

Q. Out of the car or in the car?

A. No, sir, inside the car.

Q. How long did that take, how much time did that consume, that prayer?

A. About five minutes.

Q. Was any statement made before you folks went into prayer as to what you were going to pray about, in your presence and hearing?

A. Not that I recall.

Q. So, so far as you were personally concerned, what were you praying about?

A. That we would get down that mountain all right.

Q. Do you know of your own knowledge whether your mother had ever been over that trail before this time? A. She had never been on it before.

Q. Do you know whether or not any of the other parties in the car had ever been over the trail before?

A. None of them had ever been over it, either.

(Deposition of George A. McDonald, Jr.)

Q. Did anyone there appear to you, from anything they said or did, to be apprehensive about whether they should stay or proceed?

Mr. Cobb: That's leading and suggestive, and I object to it on that ground.

Q. What are the facts with reference as to whether between 57-mile post and Thompson's Pass, you passed any houses or garages? A. No, sir.

Q. At any time after you had this brake out, did you pass any trucks or anybody on the highway?

A. No, sir.

Q. What are the facts with reference to ever stopping and asking anybody to fix your brakes, except the man at 57-lodge that you spoke about?

A. No, sir, we didn't stop any more.

Q. Before you got down there, did you pass anybody on the highway between the time you had this accident with the brake and the fluid on the ground that you described about and the time that you got to 57-mile lodge, do you recall passing anybody? A. Not that I can recall.

Q. Not that you can recall. Do you recall whether or not you passed any garages or repair shops or town between the time you broke the brake-line and the time you got to the 57-mile post?

A. No, sir.

Q. I asked whether you recall any or not, and you said "no, sir," I didn't ask whether you recall or not, I asked whether you passed any.

A. No, sir, we didn't.

Q. When up on this pass, saying this prayer, was it night or day?

(Deposition of George A. McDonald, Jr.)

A. It was approximately 1:30 in the morning.

Q. What was the condition of the weather, if you remember? A. Cool and foggy.

Q. How bad was the fog, light or heavy?

A. Fairly heavy.

Q. While you were stopped—did you proceed along in the pass and come to a stop, or just made the one stop at the top, or what are the facts?

A. We just made the one stop and that was at the top.

Q. How long did this prayer meeting continue in the car? A. About five minutes.

Q. Did you hear anybody praying outloud?

A. No, sir.

Q. State what the facts are with reference to whether or not you heard anyone state they felt they had any answer to any prayer, or whether they felt they should stay or go, or what are the facts? What was said in your presence and hearing there after the prayer?

A. I don't recall anything being said, except, I don't know who it was, but someone suggested that we go on.

Q. Do you know who made that suggestion?

A. No, I don't.

Q. State the facts with reference to whether or not anyone left the car at that point?

A. No, sir, no one left the car.

Q. State whether or not in your presence and hearing was there any discussion about whether you should proceed down the hill, down the moun-

(Deposition of George A. McDonald, Jr.)

tain, or down the pass, or to continue on the road?

A. Yes, sir, there was a little discussion on that.

Q. Do you recall the effect of it, or what was said, do you recall the exact words anyone said?

A. Well, not the exact words. I do recall someone suggesting that we go ahead, and my mother asked everybody in the car if they were willing to go ahead, and they all agreed on that.

Mr. Cobb: That's not responsive to the question.

Q. Reread the question. (Question read by the reporter.) Do you recall the exact words anyone said, just say whether you recall what anyone said, or not? A. No.

Q. You do not recall the exact words, is that what you are saying? A. That's right.

Q. Do you recall the general trend of anyone's words? A. Yes, sir.

Q. What was that, and if so, who was doing the talking, and whether or not it was in the presence and hearing of the others?

A. I don't know exactly who it was that made the statement to go ahead, but it was in the presence where everyone could hear it, and we all decided that it would be all right to go ahead.

Mr. Cobb: I object to the last part of that answer as not being responsive.

Mr. Pipkin: Just strike that part about they all decided to go ahead.

Q. Did anyone say in your presence and hearing that they did not care to proceed? A. No.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not anyone in the car made any complaint about going forward, or not?

A. No, sir.

Q. State the facts with reference to whether or not anybody in the car made any statement or movement as to about whether they would or would not stay in the car?

A. No, sir, no one made such a movement.

Q. Any houses or anything in this pass?

A. No, sir.

Q. Any lights there of any kind? A. No, sir.

Q. Any warning signs there of any kind?

A. No, sir.

Q. I believe you—did you at that point hear your mother make any statement? A. Yes, sir.

Q. All right, what did she say?

A. She asked everybody in the car if they were willing to go ahead.

Q. And what was the reply, if you know?

A. Everybody agreed to go on.

Q. State then whether or not you then proceeded down the mountain? A. We did.

Q. Who was driving? A. My mother.

Q. Now what was the nature of the road, was it pavement, or gravel, or dirt, or what was it?

A. It was blacktopped, asphalt.

Q. State whether or not the road ran straight or was winding, going up or down hill?

A. It was a winding road going down hill.

Q. Now, as you went along there, describe to us, after you started down the pass, not the pass,

(Deposition of George A. McDonald, Jr.)

started down the road, continued from this Thompson Pass on towards Valdez, state what happened.

A. Well, my mother—the car started picking up too much speed, so my mother pulled the emergency brake, pulled on that to try to slow the car down, or to stop it.

Q. How far down had you gone before she started to pick up what you say too much speed?

A. I would say approximately a quarter to half a mile.

Q. State whether or not the car was in gear?

A. It was in gear at the time.

Q. Do you know what gear, did you observe?

A. Yes, sir, it was in third gear.

Q. Now as you got down about a quarter of a mile, you say, did the car slow down?

A. No, sir, it picked up speed.

Q. State whether or not it was downgrade or upgrade part of the way, or what was the nature of it?

A. The road was downgrade all the way.

Q. State whether or not it was steep or gentle?

A. It was steep.

Q. What were the nature of the curves, with reference to whether they were sharp or gentle?

A. They were about a medium curve, slightly banked. There wasn't any hairpin turns.

Q. Did your mother make any change in her method of driving, as to what part of the road she was driving on? A. Yes, sir, definitely.

Q. Where was she driving the car, operating the

(Deposition of George A. McDonald, Jr.)

car, what part of the road, the side, middle, or what?

A. Well, she stayed on her side until we would get to a curve, then she would either hug the middle or go on the inside of the curve.

Q. When you were about a quarter of a mile down—have you ever driven a car? A. Yes, sir.

Q. How much experience have you had?

A. About four years.

Q. Do you have a driver's license?

A. Yes, sir.

Q. When you got about as much as a quarter of a mile down the highway, as you speak there, could you estimate the speed of the car?

A. I would say approximately 65, maybe 70.

Q. State whether or not your mother then made any attempt to stop the car or did she just keep going, or what are the facts?

A. She attempted to stop the car.

Q. Did you observe this, yourself, or not?

A. I did.

Q. Where were you riding at that time?

A. By the right door, in the front seat.

Q. Do you know of your own knowledge, after you left the top of this pass and going down, what brake was working on the car?

A. Yes, sir, the emergency brake was the only one working.

Q. State whether or not you observed whether your mother attempted to stop the car when the speed picked up, that you referred to?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir, I observed that she did try to stop it.

Q. State what means she used, and her actions, with regard thereto.

A. Well, she tried the emergency brake first, but the car had too much momentum and it wouldn't hold, and she tried putting it in a lower gear, and it wouldn't go in a lower gear.

Q. State whether or not the car was making any sound with regard to the gears, or what?

A. Well, there was a clashing sound in the gears, a grinding.

Q. State whether or not she stopped the car?

A. No, sir, she didn't.

Q. State whether or not she was making an effort to stop the car?

A. She was. She was trying to stop it.

Q. Did you do anything to try to stop it?

A. No, sir.

Q. Did anybody else? A. No, sir.

Q. State whether or not you observed anything that she did with reference to the gears on the car?

A. Well, she tried to get it in a lower gear, and it wouldn't go, and she tried to ram it up in reverse, and it wouldn't go, and so she tried again to ram it up in a lower gear, and it wouldn't go, so she put it in neutral and turned the engine off.

Q. State whether or not you observed her attempting to get the car in these several gears?

A. Yes, sir, I saw her trying to get it in the gears.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not the car would go in any gear. A. It wouldn't go.

Q. Now, how far did you continue, you say the car didn't stop, how far did you continue on down the road?

A. You mean before we had the wreck?

Q. Before you had an accident?

A. We went down approximately three miles.

Q. Then what happened after you had gone about three miles, what, if anything, happened?

A. We were going around a fairly sharp curve and it curved to the right, and my mother had the emergency brake up all the way down.

Q. When you say "up," what do you mean, "up?"

A. Well, she had the emergency brake up, had it applied, and started around this curve, and the emergency brake was hot and it grabbed, and we rolled over.

Q. State the facts with reference to whether or not going down up to that point she was ever able to get the car in gear? A. No, sir.

Q. Now when the car rolled over, did you fall out? A. Not the first time, no, sir.

Q. Now what was the nature of the sides of the road at that point where you made this turn, did the car turn over? A. Yes, sir, it turned over.

Q. Did it leave the highway? A. Yes, sir.

Q. Where did it go?

A. I don't know where it went. It rolled over five times.

(Deposition of George A. McDonald, Jr.)

Q. State whether or not the side, there was any canyon, or ditching, or ditch, or anything on the side of the road.

A. On the left-hand side there was a severe drop.

Q. Could you see that before you got to the curve? A. Yes, sir, we could.

Q. State whether or not, in going down the grade there, were your lights burning?

A. They were burning.

Q. State whether or not you met any traffic going down? A. No, sir, we met no traffic.

Q. Now how far—do you remember leaving the road?

A. No, sir, all I can remember is when it turned over that first time.

Q. Did it throw anybody out on the first roll?

A. Not that I know of.

Q. Do you remember anything after that?

A. Not for quite a while. After the car had stopped, that was the first I remembered anything about it.

Q. Was anybody in the car then?

A. No, sir, they were all out.

Q. Everybody was out of the car?

A. Yes, sir.

Q. Were you in the car?

A. No, sir, I was out.

Q. Did you get up and walk around any?

A. I couldn't.

Q. Were you injured in the accident?

A. Yes, sir, I was.

(Deposition of George A. McDonald, Jr.)

Q. How long did you stay there?

A. Approximately 30 minutes to an hour.

Q. Did you—were you knocked unconscious?

A. Yes, sir.

Q. Where were you when you came to yourself?

A. I was up on the shoulder of the road.

Q. How far from the blacktop?

A. I was laying right on it.

Q. You were?

A. I was laying right by it.

Q. Could you see where the car was?

A. Yes, sir, the car was right below me. The lights were pointing up in my face.

Q. Were there any lights along the highway? What are the facts, as you were going down, were there any lights lighting these turns?

A. No, sir.

Q. Did you pass any houses or shops going down? A. No, sir.

Q. Now, as you all were going along back up there where you had this accident that you related, back with the brakeline, back at that point, up until the time you were making this drive, and you stated you heard a rock or heard some noise under the car when you attempted to cross over that dirt you spoke of, was it in the middle of the highway?

A. Yes, sir, it was. It was in the middle of the highway.

Q. About how fast was she going when she crossed that?

(Deposition of George A. McDonald, Jr.)

A. I would say about ten or maybe fifteen miles an hour.

Q. State the facts with reference to whether or not when you were on Thompson's Pass, state whether or not you heard anyone make any objection to going down the mountain?

Mr. Cobb: I object to that as leading and suggestive.

He can state what he heard.

Q. State whether or not you heard anyone state whether or not you should proceed down the mountain.

Mr. Cobb: The same objection.

Q. Did they state what they should do, spend the night, or go forward, or go back?

Mr. Cobb: I object on the same ground, as leading and suggestive. He can state what was actually said.

Q. I will ask you, did anyone there in your presence, did you hear anyone object to going down the mountainside?

Mr. Cobb: The same objection.

A. Not that I recall. It has been so long since that thing happened, it is hard to remember all the details.

Q. State the facts as to whether or not you are under military orders to proceed to the State of Maine from Beaumont, Texas? A. Yes, sir.

Q. State the day you are required to leave with your orders, in order to make your point or place of destination?

(Deposition of George A. McDonald, Jr.)

A. Well, I will leave here approximately the 15th or 16th.

Q. Of what month? A. Of October, 1956.

Q. I believe you can proceed with the witness.

Cross Examination

Q. (By Mr. Cobb): You understand the proceeding we are having here today, it is a little informal around this library table, but it is just the same as if you were up in that Federal Court in Fairbanks or Anchorage, wherever this case is going to be tried, and you were under oath and testifying before the court up there, you understand that?

A. Yes, sir.

Q. And that you are to give true, complete and full answers to my questions, is that right?

A. Yes, sir.

Q. The reporter will write down my questions and your answers, and they can be used in evidence in this case under the proper circumstances, you understand that, don't you? A. Yes, sir.

Q. Before you answer any question, or if I go a little too fast for you and say something you don't understand, you ask Mr. Pipkin to explain it to you. Mr. Pipkin is representing the attorney for your father, or you can ask me to explain it, will you do that? A. I sure will.

Q. How old were you when this happened?

A. Fifteen.

Q. Just barely fifteen? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. And I understand you say you drove part of that time? A. Yes, sir.

Q. Did you have a driver's license at that time?

A. No, sir, I didn't.

Q. Did anybody drive that car besides you and your mother? A. No, sir.

Q. Who was the friend you went to see in Anchorage? A. Miss Poe Hamilton.

Q. Is she still up there?

A. I couldn't tell you.

Q. Is she married now, or do you know?

A. I don't know, I haven't seen or heard from her since 1953.

Q. Now you say before you all ever left Fairbanks that you were going to Anchorage just to see this one lady? A. Yes, sir.

Q. And stay overnight there, and to proceed to Valdez? A. Yes, sir.

Q. It wasn't a sight-seeing trip?

A. Well, it was more or less, but we wanted to see that part of the country, and we were going to see this Miss Hamilton and then down to the revival, and that gave us a perfect opportunity to do a little sight seeing.

Q. Those details weren't all worked out before you left, you were going to take it easy, you had no specific place to go, or time to be there, is that right?

A. No, sir, we were going on the trip for a special reason.

Q. A special reason, the revival meeting?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir.

Q. What day was it supposed to start?

A. I believe, sir, it was supposed to start the 31st.

Q. The 31st? A. Yes, sir, the 31st of July.

Q. Do you remember whether that was Sunday or Monday? A. No, sir.

Q. Do you remember what day this accident happened? A. I don't recall what day it was.

Q. Nobody in that car drove besides you and your mother on any part of the trip, is that correct? A. That is correct.

Q. Everybody but you and Mrs. Dickerson were killed in the accident? A. Yes, sir.

Q. Mrs. Hall and Mrs. Aronson and your mother were killed in the accident? A. That's right.

Q. Were you hospitalized at any time?

A. Yes, sir.

Q. For how long?

A. From the morning of the 31st of July, 1953 until about the 1st or 2nd of September, 1953.

Q. Then were you released from the hospital?

A. Then I was released from the hospital.

Q. Where were you hospitalized?

A. In Fairbanks, Alaska.

Q. They took you up to Fairbanks?

A. Yes, sir.

Q. About three or four hundred miles from where it happened? A. Yes, sir.

Q. Then what did you do after you left the hospital?

(Deposition of George A. McDonald, Jr.)

A. Well, I stayed there in Fairbanks for about two weeks, and one of my aunts from Austin came up there, and I came back with her.

Q. Did your daddy stay up there?

A. Yes, sir.

Q. There is no doubt that the accident when the brakeline broke happened at the 57-mile post?

A. That's right.

Q. That is, it didn't happen at the 70-mile post or anywhere else?

A. No, sir, it happened at approximately the 57-mile post.

Q. Your father is a defendant in this action, you understand that? A. Yes, sir.

Q. He is being sued, you understand that?

A. I understand that.

Q. Do you know of any way your father might have gotten any information about where the brake-line was knocked out, other than by talking to you?

A. Maybe by talking to Mrs. Dickerson.

Q. But you all were the only survivors?

A. We were the only survivors.

Q. Was Mrs. Dickerson severely injured?

A. No, sir.

Q. Did you have a head injury from this accident? A. Yes, sir.

Q. How severe?

A. Skull fracture in three places, and this (indicating).

Q. And, I suppose, along with that a rather severe concussion and contusions?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir.

Q. Are you all right now?

A. Oh, yes, sir, just as normal as anybody. I got in the service.

Q. You got in or were invited to join?

A. No, I joined of my own free will.

Q. How long have you been in?

A. About three months, or three and a half months, something like that.

Q. You don't know where your father might have gotten any idea that this accident happend at the 70-mile post?

A. No, I sure don't, because we didn't drive that far before we had that accident.

Q. When talking about 57-miles, are they talking about 57 miles from Valdez or from the juncture of these two points?

A. No, sir, it is 57 miles from Valdez.

Q. In other words, going back up the road from actually where you all were heading, they start at one out of Valdez? A. Yes, sir.

Q. And so the 57-mile post would be 57 miles out of Valdez? A. That's right.

Q. Now you drove—incidentally, I am not too familiar with Alaska, you have been up there and I haven't, you can tell me something about the summertime up there. What is the weather like in the summertime in July?

A. It gets fairly warm.

Q. In the daytime?

A. Yes, sir. It gets cool at night.

(Deposition of George A. McDonald, Jr.)

Q. How long are the days up there in the summertime?

A. Well, they usually run about twenty-three and a half hours a day.

Q. You mean, it is really that long?

A. Yes, sir.

Q. You mean it is light that long?

A. Yes, sir.

Q. In July? A. Sometimes.

Q. I am not talking about up in the real extreme northern part of Alaska, I am talking about where you all were.

A. Well, it usually stays light quite a while, but in 1953 it started getting dark early.

Q. How early?

A. Oh, I would say around 8:00 or 8:30, something like that.

Q. When would it get light?

A. About 4:00 in the morning, I guess, something like that.

Q. That's around in this southern part where you were? A. Yes, sir.

Q. But up in Fairbanks it would stay light approximately 23 hours a day?

A. Approximately, I am not sure.

Q. That's about June and July?

A. Yes, sir, about June and July.

Q. That didn't mean the sun was shining all that time, or was it shining all that time?

A. Most of the time it was.

(Deposition of George A. McDonald, Jr.)

Q. Was it raining or cloudy that you spent from the 28th to 31st, or had it been good weather?

A. It had been good weather, yes, sir.

Q. Was this road muddy or dry?

A. It was dry.

Q. You drove all the way to Anchorage from Fairbanks in one day? A. Yes, sir.

Q. This highway you go from Fairbanks to where you cut off to go to Anchorage, that's what is called the Thompson Highway?

A. That's right.

Q. And the cross one is called the Glenn Highway, is that right? A. Yes, sir.

Q. And the intersection where they come together is the intersection of Glenn and Thompson?

A. Yes, sir.

Q. You got in there early that night?

A. I would say around 8:00 o'clock.

Q. You went straight to the motel?

A. No, sir, we went to the friend's house and stayed approximately two hours, and then went to the motel.

Q. That would be the 28th? A. Yes, sir.

Q. What did you do the 29th?

A. We went back the morning of the 29th and saw Miss Hamilton again, and stayed there until up in the middle of the morning, and then we went down to Seward.

Q. You went to Seward? A. Yes, sir.

Q. How long did you stay in Seward?

A. I don't know.

(Deposition of George A. McDonald, Jr.)

Q. Then you came back and spent the night at Anchorage?

A. Yes, sir, we came back in the late evening and went to see Miss Hamilton again, and when we left there, we told her goodbye and went and got us a motel and spent the night in Anchorage again, and the morning of the 30th, we left.

Q. This motel, how many rooms did you all get get there, three rooms?

A. No, sir, we took two rooms.

Q. You were in one?

A. My mother and Mrs. Aronson and I were in one room, and Mrs. Hall and Mrs. Dickerson were in the other.

Q. Do you know whether any of these other ladies were drivers, did you know them before?

A. Yes, sir, I knew all of them for quite a while.

Q. Did you know whether any of them had driven that Dodge? A. No, sir, they hadn't.

Q. What kind of shift did it have on it?

A. Gyro-torp.

Q. Gyro-torp? A. Yes, sir.

Q. Did you have to use the clutch to shift?

A. I will try to explain it as best I can. It has a four-speed transmission—

Q. You mean four forward speeds?

A. Four forward speeds and a reverse, and on a standard shift transmission, you know where second is?

Q. Uh-huh.

(Deposition of George A. McDonald, Jr.)

A. Well, first and second on our car was in that position, and you had to use your clutch to be in that position, and when it starts moving, you let off your gas and shift in second, and when you let off the clutch, it would automatically go into third or fourth, I don't know which it was.

Q. This gear shift was on the steering column?

A. Yes, sir, on the steering column.

Q. My car, if you pull it all the way down, that's low gear.

A. Yes, sir.

Q. What was the gear in that car?

A. There wasn't one, it was blocked off.

Q. This clutch was only used to shift into reverse, is that it?

A. Into reverse, and from second to third, or from third to second.

Q. On those Dodges you can shift them without using the clutch?

A. No, sir, you can't.

Q. Had you driven this Dodge?

A. Yes, sir, some.

Q. Did you ever try to shift without the clutch?

A. No, sir, but I had a little 1940 Dodge with the same transmission in it.

A. No, sir, but I had a little 1949 Dodge with the same transmission in it, and I had tried it and it can't be done.

Q. But you had never driven this car much before the accident?

A. No, sir.

Q. Did Mrs. Aronson ever drive that car?

A. No, sir.

Q. She didn't drive it while you were there?

(Deposition of George A. McDonald, Jr.)

A. No, sir.

Q. Did any of the other passengers ever drive that Dodge? A. No, sir.

Q. How old is Mrs. Aronson?

A. I couldn't tell you. I would say about 45.

Q. And Mrs. Dickerson, how old is she?

A. She was about 35.

Q. Was Mrs. Dickerson as seriously injured in this accident as you were?

A. No, sir, she luckily wasn't injured very much at all. She was bruised up.

Q. When you first left Anchorage you say you drove about 30 miles out of there?

A. No, sir, I drove for about 30 minutes.

Q. You drove for about 30 minutes, so you wouldn't have made 30 miles?

A. No, sir, I was going slow.

Q. Why was it you changed with your mother?

A. Well, I just wanted to drive a little while and she let me drive.

Q. That was a car owned by your father?

A. Yes, sir.

Q. And your mother? A. Yes, sir.

Q. And they were living together?

A. Yes, sir.

Q. Did they have two cars?

A. That's the only car we had.

Q. For whatever purpose the family needed an automobile, that was it? A. That was it.

Q. It was furnished by your father to your mother with his knowledge? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. I mean she didn't sneak off with it

A. No, sir.

Q. And it was for this particular trip in mind?

A. That's right.

Q. Do you know whether there were any instructions about whether you should drive it or not?

A. No, sir.

Q. You didn't hear any anyhow?

A. No, sir, I didn't hear any. He didn't care if I drove a little bit.

Q. But you only drove about 30 minutes?

A. About 30 minutes.

Q. None of the other ladies drove any?

A. No, sir.

Q. What time did you leave Anchorage going back up to the Thompson-Glenn Highway?

A. I couldn't say for sure, maybe 8:30 or 9:00 on the morning of the 30th.

Q. At the time you left there, is it your testimony, and I want to be sure to understand it, that everybody knew at that point that they were going to go to Valdez? A. That's right.

Q. How do you know they knew that, did you talk to all of them?

A. Well, there was something said on the road about the revival at Valdez.

Q. There was something said on the road about it, in other words then nobody had ever——

A. See, that's why we left Fairbanks was to go down there to the revival, and so I was aware of it all the time. I mean there actually hadn't even

(Deposition of George A. McDonald, Jr.)

been anything brought out and said anything definite——

Q. You don't know what arrangements or agreements had been made by any of the other ladies on this trip? A. No, sir, no agreements.

Q. What you are testifying about going to Valdez is based on your own understanding?

A. On my own understanding.

Q. And you don't know what these other people understood about it? A. That's right.

Q. Is there a roadhouse or anything on these two highways where they intersect?

A. I don't recall.

Q. About how far is it?

A. I would say about 150 miles.

Q. Isn't it a fact at that intersection these two other ladies requested your mother to go on back to Fairbanks at that time? A. Not that I recall.

Q. There could have been such a request and you don't remember it, couldn't there?

A. That's right.

Q. But at that intersection you turned to your right and proceeded on—is that highway 1?

A. No, that's the Richardson Highway.

Q. You proceeded then to go to Valdez?

A. Yes, sir.

Q. Now you say your mother had never been over these highways before? A. That's right.

Q. Had any of these other ladies that you know of? A. Not that I know of.

Q. Well, you had a map in your car, didn't you?

A. I don't recall.

(Deposition of George A. McDonald, Jr.)

Q. You mean to say you all were going to make a round trip in Alaska over roads that you never had been on——

A. They are marked.

Q. ——that nobody with you had ever been on and you didn't have a map?

A. They might have had a map in the car, I don't remember.

Q. You don't remember? A. No, sir.

Q. The main use of a map on Alaskan highways is to find out where filling stations and lodges and places are? A. That's right.

Q. It is not like driving from Beaumont to Houston, you don't have to worry about gasoline on that highway, but up in Alaska you do, don't you?

A. That's right. Your map gives you what mile-posts there are.

Q. And there is not a filling station every ten miles? A. No, it is not like it is down here.

Q. And that's why you have mile posts every few miles? A. Yes, sir.

Q. There was a map in the glove compartment of that car, wasn't there?

A. I imagine, but I couldn't be sure.

Q. Do you remember what time of day you got to the intersection of Thompson and Glenn Highway? A. No, sir, I don't.

Q. It would be somewhere around noon, wouldn't it? A. I just really don't remember.

Q. From Anchorage did you make any stops?

A. Yes, sir, I think one time to eat.

(Deposition of George A. McDonald, Jr.)

Q. Where was that?

A. Palmer, we stopped at Palmer.

Q. From there, after you left Palmer, until the time your brakes went out, did you make any other stops? A. Not that I can recall.

Q. You don't recall any others?

A. No, sir.

Q. Now when Mr. Pipkin was asking you some questions, I believe you said that after you had been at your friends' house in Anchorage, I believe you made this statement, "We decided to go to Valdez", isn't it a fact you decided to go to Valdez, I mean the final decision was made in Anchorage rather than up in Fairbanks?

A. Well, no. Actually when I said we decided to go to Valdez from Anchorage, I meant we were going to leave Anchorage there and go because it was more or less decided when we left Fairbanks that we would go down there.

Q. Were all these ladies members of the same Church?

A. We were all members of the same Church.

Q. And that's the Southern Baptist Convention?

A. Yes, sir.

Q. Now, as I understand, they were working on the road around the 57 mile post and graders had built up a pile of dirt in the middle of the road?

A. That's right.

Q. And not only dirt, it was mixed in with gravel and rock? A. That's right.

Q. And the right side of the road was under

(Deposition of George A. McDonald, Jr.)

construction and that caused you to have to go over that hump? A. That's right.

Q. Had you been over that hump more than once before your brakes went out?

A. No, sir, we hadn't.

Q. And when you did that you heard a loud noise?

A. It wasn't a scraping noise, it was a thump.

Q. It was a thump, and you felt it in your car?

A. Yes, sir.

Q. How did she come to a stop at that time?

A. Well, she put the brakes on, and it slowed down for just a second until all the fluid bled out of the line and she had to use the emergency brake.

Q. And she was only then traveling about 10 or 15 miles an hour? A. That's all.

Q. Had any of the other people in your car had occasion to test out the effect of the emergency brake to know how that affected your car?

A. No, sir.

Q. And you hadn't, and you never used the emergency brake? A. No, sir.

Q. And from that point on until the accident you never had occasion to feel the brakes or to use them or see how they were working from your own experience? A. No.

Q. And the same is true as to the other ladies?

A. That's right.

Q. So actually your mother's knowledge as to how the car was working was a little bit better than the other occupants of the car?

(Deposition of George A. McDonald, Jr.)

A. That's right.

Q. Because she was the one that was driving it and the one that was manipulating the emergency brake?

A. That's right.

Q. The emergency brake in that car is really a parking brake, isn't it?

A. Yes, sir, that's about all it is good for.

Q. These ladies call it an emergency brake?

A. All it does is tighten down on the drive shaft and keep it from rolling when you are parked. It is not actually an emergency brake.

Q. You know these ladies had that impression of the brake, they thought it would stop the car?

A. Yes, sir.

Q. But you knew it didn't work the brake drums at all?

A. I knew that.

Q. And you knew it didn't work a set of four wheel hydraulic brakes?

A. I knew that.

Q. And you don't know whether Mrs. Aronson knew it or not?

A. No.

Q. Or your mother?

A. I don't know whether my mother knew that or not.

Q. But you knew that yourself?

A. I knew how it worked.

Q. And these other ladies in there were not as familiar with the feel of that automobile or didn't have any occasion to become familiar with the way that car drove without foot brakes, but using the parking or emergency brake?

A. That's right.

Q. Now after you got out, you said you came

(Deposition of George A. McDonald, Jr.)

around—first of all, I believe you said you smelled brake fluid, is that right? A. Yes, sir.

Q. And that you know how it smelled?

A. Yes, sir.

Q. I believe you answered Mr. Pipkin you were very familiar with the smell of it?

A. That's right.

Q. How are you very familiar with it?

A. Well, my daddy had a used car lot and I worked down there for him. I did some work on those cars and just minor stuff, and I was familiar with the smell of brake fluid from filling up the master cylinders and all of that on the cars out there.

Q. When you went around to look, was it dark?

A. Yes, sir, it was dark.

Q. Did you have a flashlight?

A. No, sir.

Q. Did you have a lighter or match?

A. No, sir.

Q. You had one in the car, didn't you?

A. Well, I imagine, but I didn't want to strike a match back there.

Q. Why not?

A. Because it will catch on fire.

Q. It is not as *voluble* as gasoline?

A. No, sir. I thought it was gas at first.

Q. You said you went back on the driver's side and told your mother in a low voice?

A. Well, I was just standing right there and my mother doesn't like for people to holler at her, and

(Deposition of George A. McDonald, Jr.)

in a light voice I told her what was wrong. I didn't try to hide anything from the people in the car.

Q. Did you tell your mother and subsequently did your mother tell the other people in the car?

A. No, sir, I told them myself.

Q. I thought you meant your mother told them?

A. No, I told her, and after I got back in the car they asked what was wrong and I told them, and she tried the brakes and they went to the floor.

Q. Just about like a clutch?

A. Yes, sir, just about.

Q. At that time do you remember a truck coming by and stopping?

A. Not at that time.

Q. When do you remember a truck coming by and stopping? A. I don't.

Q. You don't remember that at all?

A. No, sir.

Q. Do you remember a truck coming by in a few minutes going in the opposite direction?

A. No, sir, I don't remember that.

Q. You don't remember that?

A. No, sir.

Q. Now as to any of these conversations you said took place in the car, do you remember anything specifically Mrs. Earl Aronson said, Flo Aronson?

A. No, sir, I can't remember anything specifically.

Q. Do you remember her saying, "All right, let's go ahead", or anything at all that was said?

(Deposition of George A. McDonald, Jr.)

A. I can't remember anything definitely that any one person said, no, sir.

Q. Do you know whether Mrs. Aronson had ever driven that automobile?

A. No, sir, she hadn't that I know of.

Q. So when you say people had a discussion about it, you don't know whether Mrs. Aronson joined in the discussion or not?

A. She probably did.

Q. Do you know whether or not she did?

A. Oh, yes, sir, they all were in the discussion.

Q. Now if there was such complete agreement, why were there so many discussions?

A. Well, to make sure that everybody was satisfied.

Q. Everybody was satisfied?

A. I imagine so.

Q. If everybody expressed satisfaction, why did you have more than one discussion?

A. Well, I guess my mother figured everybody was entitled to change their mind.

Q. As a matter of fact, a few of them expressed the desire to turn around and go back, didn't they?

A. I don't know. I don't recall anybody wanting to go back.

Q. This isn't a part of the country where you would get out in the middle of the night and be safe, was it? A. That's right.

Q. Actually it is wilderness there, isn't it?

A. That's right.

Q. There are no houses around, no filling sta-

(Deposition of George A. McDonald, Jr.)

tions, and very little traffic? A. That's right.

Q. Any wild animals around?

A. Yes, sir, quite a few.

Q. What kind?

A. Bear, wolverine and moose and things like that.

Q. It is not a place—it is not like going from here to Houston, if something happens you can get out to one of these little towns, is it?

A. No, sir, it is not like that, it is wilderness.

Q. It is wilderness? A. Yes, sir, it is.

Q. Is it cold up there too?

A. Not real cold through the summer. It gets cool but not real cold.

Q. There wasn't any actual choice as to the passengers about getting out and staying in the middle of the wilderness in the middle of the night, was there?"

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: We object to that as calling for the conclusion of the witness and taking over the function, if anything, of the court. [52]

The Court: I think I understand the objection, but I will overrule it.

(Continued reading deposition from line 14, page 76 to line 5, page 78.)

"A. No, no one that I can recall really wanted to.

Q. I mean that's the reason for it, wasn't it, I

(Deposition of George A. McDonald, Jr.)

mean you wouldn't drive off and leave a woman out there?

A. No, they were all four sensible, and I really believe if anyone had really wanted to turn around and go back, the rest of them would have been willing rather than just making them go on.

Q. That's your belief?

A. That's right, I really believe that because I have known those women for a long time and they are very sensible.

Q. From your own knowledge up there, if a person had refused to go on and had gotten out of the car, the chances of survival would have been pretty small?

A. No, sir, not necessarily.

Q. Well, it is possible?

A. If they stayed on the highway there is not much danger of the animals bothering them because the animals are as much afraid of a person as they are them.

Q. That's just your idea?

A. That's a fact, until you corner one. Well, now you take a woman, she is liable to start running any direction.

Q. There was no real choice about them getting out—

A. They could have if they wanted to.

Q. They could have and you could have left them out there?

A. Yes, sir, they could have, but we wouldn't have. If one of the women would have really wanted to turn around and go back, I mean just whole-

(Deposition of George A. McDonald, Jr.)

heartedly wanted to go back, my mother would have turned around and carried her back.

Q. You know what was inside your mother's mind?

A. I know what my mother would have done.

Q. You are not going by what anyone said?

A. No, sir, I am not going by what anyone said or nothing, I am going by what I know about my mother.

Q. State whether or not you know about any of those ladies stating——

A. Of my own knowledge they didn't.

Q. Of your own knowledge they didn't?

A. No, sir."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: It is twelve o'clock. Do you want to stop?

The Court: Very well, this case, then, will be resumed at two o'clock.

Mr. Clasby: If the Court would rather resume at 1:30, I am willing to start then.

The Court: I am reluctant to say 1:30, because I know attorneys have appointments in their offices, but I would be pleased to resume at 1:30 if you like.

Mr. Johnson: That is agreeable.

Mr. Clasby: It looked like about another hour and a half reading, so perhaps it would be three before we reach argument. It might be advisable to try 1:30.

(Deposition of George A. McDonald, Jr.)

The Court: I will be very pleased to resume at 1:30. Very well.

Mr. Johnson: Thank you, your Honor.

(Thereupon, at 12:05 p.m., a recess was taken until 1:30 p.m.)

Afternoon Session—1:30 P. M.

Clerk of Court: Court has reconvened.

The Court: Are you gentlemen ready to proceed?

Mr. Johnson: The plaintiff is ready, your Honor. [53]

Mr. Clasby: We are, your Honor.

The Court: Very well.

Mr. Johnson: Before the recess we had completed the first five lines on page 78 of the deposition, your Honor.

(Continued reading deposition of George A. McDonald, Jr., from line 5, page 78, through line 4, page 86.)

“Q. It was never mentioned?

A. It was never mentioned.

Q. And yet you had about four conversations about whether to go ahead or not?

A. That was after the accident.

Q. After the brake fluid? A. Yes, sir.

Q. Before the brake fluid went out how many conversations did you have before the accident about whether you should go ahead or not, you related several of them.

A. Maybe one or two.

(Deposition of George A. McDonald, Jr.)

Q. You related one at the times the brakes went out? A. Yes, sir.

Q. The 56 Mile Lodge and on top of the hill?

A. Yes, sir.

Q. That's three of them, and you had three conversations about whether you should go ahead or not, and yet you don't remember any of those four women expressing any dissent at all?

A. Well, they were all saying, "If you want to go, go ahead, it doesn't matter to me." That's why I say if one of them had really wholeheartedly wanted to go back, my mother would have turned around and taken them, but they were saying, "If you want to go ahead, go ahead."

Q. But they were relying——

A. On my mother's driving, that's what they were doing.

Q. And she said the emergency brakes were good?

A. The emergency brakes were good.

Q. Now Thompson Pass shows up on these maps, doesn't it? A. Uh-huh.

Q. Do you know whether or not — where is Thompson Pass?

A. Right there (indicating on the map).

Q. Well, is this true, that mountain country was encountered before you got to Thompson Pass?

A. Not particularly, no, just a few little hills.

Q. Was there fog when you got to the few little hills? A. No.

Q. There was no fog? A. No.

(Deposition of George A. McDonald, Jr.)

Q. And it wasn't often dense fog before you got there? A. No.

Q. Now when you got to the mountain pass, now did you ascend a deep mountain pass?

A. No, sir, you couldn't hardly even tell you were going up.

Q. It was very gradual?

A. It was very gradual.

Q. And when you got to the top, was it foggy or clear? A. There was fog.

Q. Was it foggy clear to the ground?

A. No, it wasn't.

Q. Was it foggy enough you could see through it with your headlights?

A. Yes, sir, it was more or less on top. It was more or less a cloud formation there on top is what it was.

Q. You couldn't see very far in front of you?

A. Not at that point, no, sir.

Q. How do you know at that point you were on top of the pass if you couldn't see?

A. Because you could see the drop down.

Q. Yet the climb was very gradual?

A. Yes, sir.

Q. You didn't notice any steep ascent?

A. No, sir, I didn't notice it myself.

Q. And the reason you didn't notice it is because it wasn't there?

A. That's more than likely right.

Q. And if you didn't notice it, there was no occasion for any of the other ladies to notice it?

(Deposition of George A. McDonald, Jr.)

A. That's right.

Q. Now at that pass is there a sign saying it is Thompson's Pass?

A. Not that I can recall.

Q. You do not know whether you had a map in your glove compartment or not?

A. No, I don't know.

Q. If you had one you see that Thompson's Pass' elevation is 2271 feet, couldn't you?

A. That's right.

Q. You would have also known that there were no roadhouses and filling stations between the 56 Mile Lodge and Valdez, is that right?

A. That's right.

Q. Yet there are back up the other way?

A. I am not sure.

Q. You are not sure? A. No.

Q. You could have found out where the closest one was, couldn't you?

A. Yeah, if we had had a map. There might have been a map in there but I sure don't know about it.

Q. Well, now actually in the operation of your car—strike that question. Where is your father?

A. He is in Houston.

Q. Is he going to Alaska next week or do you know? A. I don't know.

Q. When was the last time you conversed with him?

A. Well, let's see, it was about day before yesterday.

(Deposition of George A. McDonald, Jr.)

Q. Do you know whether he is going up there?

A. No, I don't know for sure. All he said to me was be sure and come down here.

Q. Now the times you have said you observed your mother trying to change gears, was it light or dark in the car? A. It was dark.

Q. Did you have a dome light in the car?

A. Yes, sir, a light in the ceiling.

Q. Was that on or off? A. It was off.

Q. Do you know whether at any time your mother tried to shift those gears with her foot?

A. She sure did.

Q. Could you see it?

A. No, sir, you could tell by the sound of the engine.

Q. Did you notice her doing that just in the clutch? A. Yes, sir, she did.

Q. How did you notice her do that?

A. By the sound of the engine.

Q. Is that the only way you noticed it?

A. That's right, and noticing her leg.

Q. Did you observe her leg?

A. No, but if I had looked I could have seen it.

Q. But you didn't look? A. No, sir.

Q. How fast was she going before she tried to shift gears? A. That would be hard to say.

Q. By that time she was going pretty fast?

A. Pretty fast, yes, sir.

Q. Well, the reason she couldn't shift them, she was going too fast? A. Yes, sir.

Q. The engine had gotten up too fast?

(Deposition of George A. McDonald, Jr.)

A. I imagine so.

Q. She could have shifted them if she had tried them a little earlier? A. I imagine so.

Q. And the fact that was a steep drop was obvious to you and obvious to the driver?

A. That's right.

Q. And it was also apparent to you at that time that she didn't have any brakes?

A. It was apparent long before then.

Q. When these discussions about going ahead if you want to were had, was there a statement made by your mother that the emergency brake was still working? A. Not that I can recall.

Q. You mean these people went ahead without any knowledge of the emergency brake working?

A. Well, she had to use it a couple of times and it was working, and I imagine they felt that it was.

Q. I mean you can't recall, you can't say?

A. No, that has been almost four years ago.

Q. That's the reason I am asking you about some of these questions you testified about.

A. I don't recall her actually coming out and saying these emergency brakes are good, let's go on.

Q. Actually remembering anything being said about them, you can't, about the emergency brake being good?

A. Maybe once where she said something about the emergency brake holding or something, I don't know.

Q. Now when this man—you stopped at this station and this man came out, do you remember of

(Deposition of George A. McDonald, Jr.)

your own independent knowledge that conversation?

A. Most of it, yes, sir.

Q. You remember it of your own knowledge?

A. You mean between my mother and the man?

Q. Yes, sir, you were still in the car at that time?

A. I was still in the car.

Q. Everybody was in the car?

A. He was around by her side.

Q. He was by her window?

A. I imagine he thought we wanted some gas or something and he came out and asked if he could help.

Q. And you stated he stated that the road was good all the way?

A. He stated that the road was good.

Q. You don't know whether anybody else in there heard that or not?

A. I imagine they all heard it.

Q. Do you know whether or not Mrs. Aronson in the back seat heard it?

A. Oh, I am pretty sure she did.

Q. You can testify that she heard it?

A. I imagine so.

Q. You imagine so?

A. I am pretty sure she heard it, and everybody was awake.

Q. Did you give more than one statement about how this accident happened?

A. What do you mean?

Q. A written statement, somebody would come up and ask your name and how it happened and you

(Deposition of George A. McDonald, Jr.)

would tell them all you knew about it and signed it at the bottom. A. I gave one.

Q. You have only given one?

A. Yes, sir."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: If the Court please, the next question and answer is objected to on the ground that it is incompetent, irrelevant and immaterial.

Mr. Clasby: We concede that it shouldn't be in the record.

The Court: Very well.

(Continued reading deposition from line 7, page 86, through the last line on page 86.)

* * * * *

"Q. Some representative at Fairbanks, is that right?

A. Yes, sir. That was right after I got out of the hospital.

Q. Was that on or about September 11, 1953?

A. Yes, sir.

Q. And you were then a student at the Fairbanks High School? A. That's right.

Q. That was to have been your freshman year and "I have been in the hospital now and can't start until the second half," is that what you told him? A. Yes, sir.

Q. Was that correct? A. That's right.

Q. Now did you tell him that you didn't remember whether there was any vehicle that caused you

(Deposition of George A. McDonald, Jr.)

to get on the other side of this center pile of dirt or it was because of the holes on the other side, that you just didn't remember why you crossed?"

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: If the Court please, we object to this line of questioning as an attempt to impeach their own witness. This comes as one of the peculiarities when the party proposing the deposition does not introduce it, but having introduced the deposition proposed by us they make this witness their own and according to the rules of practice, they should not be permitted to impeach their own witness.

Mr. Johnson: I believe, your Honor, under our own rules and statutes, as I recall it, it is just like calling another party, that you certainly have the right to impeach and even your own witness you can impeach if it becomes necessary.

The Court: Only under certain circumstances can you impeach [54] your own witness, but I will overrule the objection.

Mr. Clasby: May I have, without noting it in the record, a continuing objection to the examination on that particular point? I think there are several pages on it that run along the same line.

The Court: Perhaps you should interpose the objection.

Mr. Clasby: All right.

The Court: I don't know what is coming, of course, but I think you had better interpose your objections as we go along, until such time as it

(Deposition of George A. McDonald, Jr.)

seems apparent that a standing objection may be taken.

Mr. Clasby: All right.

(Continued reading deposition from line 1, page 87 through line 8, page 87.)

“A. So far as I remember, it was because of the holes.

Q. I am asking you if you remember if you told him why you went over there?

A. No, I don't remember if I told him that or not.

Q. Did you tell him you were stopped there just a couple of minutes when a truck came by going in the opposite direction?”

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: Same objection.

The Court: Same ruling.

(Continued reading deposition from line 9, page 87 through line 4, page 89.)

“A. Not that I recall.

Q. You don't remember whether you did that or not?

A. I don't remember a truck coming by.

Q. I am asking you if you remember what you told him? A. No, I don't.

Q. This statement was taken approximately 30 or 40 days following the accident?

A. That's right.

Q. And your memory about it was better than it is now? A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. You were not under drugs or ether or anything like that? A. That's right.

Q. Did he come to your house?

A. We were living in the Northwood Building, daddy and I, and he came there.

Q. He came to your house? A. Yes, sir.

Q. And you gave him a statement?

A. Yes, sir, I gave him a statement.

Q. Did you read it over before you signed it?

A. No, I didn't. My daddy did.

Q. Your daddy did. Well, did he come with a statement already prepared or did he come out there and talk to you first?

A. I don't know how he did it.

Q. Well, he did talk to you some little time and typed up the statement and asked that it be signed, is that right? A. That's right.

Q. Did you tell him that after your brakes—you learned that your brakes went out that you went on and came to a place on the left hand side of the road which was a bar and eating place, is that true?

A. That's right.

Q. I will ask you to speak up, she can't hear you. A. That's right.

Q. "And a man came out just as we drove up," did you tell him that? A. Yes, sir.

Q. Is that true? A. That's right.

Q. Did you tell him someone talked to him but I don't remember what he said?"

[The following matter is from the District Court Reporter's Transcript:]

(Deposition of George A. McDonald, Jr.)

Mr. Clasby: The same objection.

The Court: Yes, overruled.

(Continued reading deposition from line 5, page 89, through line 25, page 90.)

“A. No, I know what he said.

Q. You know what he said?

A. That’s right.

Q. But you didn’t know on September 11th what he said?

A. No, I didn’t tell him I didn’t know.

Q. Who was there when this statement was taken, was your daddy there? A. Yes, sir.

Q. And he read it over and he was present the whole time this man was there? A. Yes, sir.

Q. And you weren’t forced to make any statement? A. No, sir.

Q. And if it wasn’t correct, your father would have stopped him?

A. Well, my father wasn’t at the wreck.

Q. And because your father was there, you weren’t forced to sign anything, were you?

A. No, but I didn’t read it.

Q. You didn’t read it, was it read to you?

A. No, my daddy read it.

Q. It wasn’t read to you and you didn’t read it?

A. He was sitting there while I made the statement, and after it was typed up my daddy read it to make sure it was worded the way that I said it, and he told me to sign it.

Q. Then your father was present and listened all the time that you and this representative talked,

(Deposition of George A. McDonald, Jr.)

is that right? A. That's right.

Q. And he heard the whole conversation?

A. That's right.

Q. And he read it over before you were to sign it? A. That's right.

Q. And the reason that he read it over is that he told you to make sure that it coincided with what you had said in your father's presence?

A. That's right.

Q. And then he told you to sign it?

A. That's right.

Q. You had every opportunity to read it?

A. It wouldn't have done me any good. I didn't know anything about what he was writing anyway.

Q. You mean——

A. I don't know—every time someone writes up something like that they seem to change it around some."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: Now, if the Court please, the next two questions and answers are objected to on the ground that they are incompetent, irrelevant and immaterial. [55]

Mr. Clasby: We agree that should be eliminated as being improper.

The Court: Very well, that shall be omitted.

(Continued reading deposition at line 8, page 91, through line 1, page 96.)

* * * * *

Q. How long was your father there, was he

(Deposition of George A. McDonald, Jr.)

there about five minutes or was he there an hour?

A. It was about an hour.

Q. And you and the representative were there all at the same time with your father, all in one room?

A. Yes, sir.

Q. And your father listened to his questions and your answers?

A. That's right.

Q. I want to make sure you understand you are under oath, and you still state you haven't read that statement before you signed it?

A. I haven't read that statement.

Q. Do you know whether or not your father's deposition in this case has been taken?

A. No, I don't.

Q. Did you go over this statement this morning before I got here with Mr. Pipkin?

A. A little bit.

Q. A little bit? A. Yes, sir.

Q. What do you mean by a little bit?

A. Oh, we talked about it.

Q. You talked about it, is that when you first told anybody that you hadn't signed this before you read it?

A. No, I didn't say anything about that.

Q. You didn't tell anybody that?

A. No, sir.

Q. Didn't Mr. Pipkin ask you whether you had read this statement?

A. Not that I recall.

Q. Did he let you read it in his office?

A. No.

(Deposition of George A. McDonald, Jr.)

Q. Did you ask to? A. No, sir.

Q. What did you talk about?

A. The same thing we have talked about here.

Q. Did you talk about the statement you have given?

A. No, we just went over some of the facts and I showed him the place on the map, that was all.

Q. Did you read anybody else's statement?

A. No, sir.

Q. Did you read anything while you were in Mr. Pipkin's office?

A. I haven't read nothing, not one thing.

Q. Did you tell him you had made a statement?

A. I believe so.

Q. You told him that?

A. I believe it was brought out that I had made a statement.

Q. And did you tell him at that time that statement you never had read it, and couldn't tell him what was in it? A. No, sir.

Q. You never have told him that?

A. I sure didn't.

Q. But this statement is not correct, "Someone talked to me and I don't remember what he said"?

A. He took a statement from me and also took a statement from Mrs. Dickerson.

Q. I don't have Mrs. Dickerson's statement, I don't represent her.

A. He fouled it up somewhere.

Q. You know he fouled it up but you don't know how because you never read it?

(Deposition of George A. McDonald, Jr.)

A. That's right.

Q. That day to this have you ever read that statement? A. I haven't even seen it.

Q. You haven't even seen it? A. No.

Q. And you didn't read it that day?

A. No, I haven't seen it.

Q. And yet you are willing to testify that statement was not correct? A. I would.

Q. Let's see if I understand you and you understand me, you talked to this investigator and representative at your home in the presence of your father? A. That's right.

Q. And he then took out a typewriter and wrote a statement, do you remember whether it was one or two pages long? A. No, I don't.

Q. But you didn't read it? A. No, sir.

Q. And you haven't read it in the two or three years that have elapsed since then?

A. No, sir.

Q. And yet you are willing to swear under oath here today that that statement is wrong?

A. According to that.

Q. Are you——

Mr. Pipkin: Let him answer.

A. According to that last question you asked me, that statement is wrong, unless I misunderstood it, and I don't believe I did.

Q. Are you willing to swear then that that statement is wrong?

A. Yes, sir, on some of it, but I sure don't remember any truck coming up there, and I don't re-

(Deposition of George A. McDonald, Jr.)

member telling him that one did or anything like that.

Q. Actually you are on leave now, you are not on any orders to go anywhere?

A. I am on traveling orders.

Q. Traveling orders? A. Yes, sir.

Q. Where do you have to be?

A. I have to report to Loring Air Force Base in Limestone, Maine the 22nd of October.

Q. The 22nd of October, that's 18 days from now?

A. That's right, but I have to have plenty of time in case something happens.

Q. Did you tell him this, did you tell him that after you left the roadhouse that your mother drove slowly? A. Yes, sir.

Q. Is that true?

A. Yes, sir, she did drive slow.

Q. Did you tell him that the gear lever was in the down position? A. Yes, sir.

Q. Is that true?

A. That's true."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Clasby: If the Court please, I would like to have it understood that our objection is to the last couple of questions and the next several pages. It is the same type of attempted impeachment.

The Court: Very well.

(Continued reading deposition from line 2,

(Deposition of George A. McDonald, Jr.)

page 96, through to the end of the deposition,
page 131.)

“Q. Did you say, “I don’t remember how far we
drove before we started down the hill?”

A. That’s right.

Q. Is that true? A. That’s true.

Q. Do you remember saying, “I do remember
mother trying to shift into the lower range”?

A. That’s right.

Q. Is that true? A. That’s true.

Q. Did you tell him, “I heard the noise of
gears,” is that true? A. That’s right.

Q. Did you say, “I believe she had the head-
lights on”?

A. I didn’t say I believe she had the headlights
on because I knew she had the headlights on.

Q. Is that true? A. That’s true.

Q. Did you say, “It was getting pretty dark”?

A. No, sir, I didn’t say it was getting pretty
dark because it was dark, and I am pretty sure I
told him it was.

Q. Well, was it dark when the brakes went out
or was it still light?

A. It was fairly dark.

Q. Did you tell him, “I recall we went up in the
hills a bit and it was foggy on the hill”?

A. That’s right.

Q. Is that true?

A. That’s true, referring to the summit.

Q. Did you say the fog extended clear down to
the road? A. That’s right.

(Deposition of George A. McDonald, Jr.)

Q. Is that true? A. True.

Q. Did you tell him, "I couldn't judge how far into the fog we could see"? A. That's right.

A. Is that true? A. That's true.

Q. Did you tell him, "I have no recollection of stopping after our stop at the roadhouse"?

A. No, I don't remember telling him that.

Q. Is that true?

A. You mean did I tell him that?

Q. Is it a true statement that, "I have no recollection of stopping after we stopped at the roadhouse"?

A. No, sir, because I have a recollection of it.

Q. In other words, now you have a recollection of it? A. I did then.

Q. You don't know where he got the idea for this statement? A. No, I don't.

Q. But all the other things I read in there are true?

A. They are true because we did stop.

Q. But that one thing is not true?

A. That's right.

Q. Did you tell him, "After starting down the fog decreased"? A. That's right.

Q. Is that true? A. That's true.

Q. Did you tell him, "Mother saw we were picking up too much speed, I believe she set the emergency brake"? A. She did.

Q. And that's true? A. That's true.

Q. Did you say, "I don't know if it slowed the car down at all"? A. That's true.

(Deposition of George A. McDonald, Jr.)

Q. "I just don't remember much about anything connected with the case from here on until after I had reached medical care"? A. That's right.

Q. From the time you started down there you just didn't remember anything?

A. Well, I can remember up until the time we turned over.

Q. Then your mind is blank until the time you starting getting some medical care?

A. That's right.

Q. So that part all is true?

A. That's right.

Q. Is this part true, "When we stopped at the roadhouse, I don't have any recollection about anyone in the car expressing any concern about continuing on without the brakes?" A. No, sir.

Q. That's true? A. That's true.

Q. Did you say, "I just don't have any recollection of that point nor do I remember when she stopped at the roadhouse that any discussion was had as to whether we should stop or to continue on," you just don't remember whether there was any conversation had at that point?

A. Well, there was.

Q. So that part is not true? A. That's right.

Q. Other than that statement and your talking to Mr. Pipkin this morning, you haven't discussed this with anybody else? A. No, sir.

Q. From July 31st, 1953 until October 4th, 1956? A. Oh, people have asked me—

(Deposition of George A. McDonald, Jr.)

Q. I mean in detail. You said you were in an accident, I can understand that.

A. I mean it hasn't been in detail, no.

Q. About how it happened and the facts that led up to it. A. No.

Q. You have no independent recollection of Mrs. Aronson, as to whether she ever expressed any desire that you turn around and go back?

A. I don't have any recollection of that whatsoever, as to her actually coming out and saying go back, I don't.

Q. You don't have any recollection on that one way or the other? A. No, I don't.

Q. Do you have any recollection of Mrs. Aronson's statement one way or the other that you should wait until the next day?

A. No, I don't have any recollection on that either.

Q. She was in the back, I believe?

A. Yes, sir.

Q. Along with Mrs. Hall?

A. No, Mrs. Dickerson and Mrs. Aronson were in the back.

Q. So the surviving person that was sitting closest to Mrs. Aronson is Mrs. Dickerson?

A. That's right.

Q. Had your mother ever traveled these highways in Alaska before this trip?

A. You mean those particular highways?

Q. Well, any degree of Alaskan travel at all?

A. Not by herself.

(Deposition of George A. McDonald, Jr.)

Q. As a driver? A. No.

Q. She had not? A. No.

Q. Yet you told Mr. Pipkin that she was an experienced, good driver?

A. She was a good driver.

Q. But she never had been on these Alaskan roads by herself before or as a driver? A. No.

Q. You have no independent recollection that you can actually testify to whether or not Mrs. Dickerson made any request that the damage be repaired or that the whole party turn around and go back to Fairbanks?

A. No, I don't remember anything about that.

Q. How long had you been living in Alaska before this accident happened? A. Since 1951.

Q. Since 1951, your mother had been up there all that time? A. Yes, sir.

Q. And she had never driven these highways herself or actually driven over them?

A. No, because each time we had been out my daddy was with her.

Q. Had any of these ladies with you ever made any of these trips before with them?

A. Mrs. Aronson had been over the Alcan Highway with us before.

Q. Isn't that any one of these?

A. No, sir, it didn't have anything to do with these.

Q. At the time they had gone over that highway, your father was driving? A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. And you say at the top of Thompson's Pass that the car stopped and a discussion was had?

A. That's right, sir.

Q. You remember it? A. I remember it.

Q. Everybody else in the car that survived, that is, Mrs. Dickerson, she should also remember it?

A. She should also remember it.

Q. And the reason it sticks in your mind, you had a prayer meeting at that time?

A. That's right.

Q. And you stayed there five minutes?

A. Approximately that time.

Q. Five or ten minutes, that's your best recollection? A. That's my best recollection.

Q. And again a further discussion was had?

A. Yes, sir.

Q. And it is your testimony under oath that Mrs. Dickerson and Mrs. Aronson said go ahead?

A. So far as I remember, yes, because——

Q. Your memory——

Mr. Pipkin: Let him finish his answer.

Q. (By Mr. Cobb): You said so far as you remember because.

A. Well, it has just been so long, you can't remember just word for word.

Q. You can't swear word for word whether or not Mrs. Dickerson or Mrs. Aronson asked to turn around. A. That's right.

Q. And the same is true at the filling station back up there? A. That's right.

Q. It was the family automobile?

(Deposition of George A. McDonald, Jr.)

A. Yes, sir.

Q. Is your father also a Baptist?

A. Yes, sir.

Q. Was it his idea that you go to this revival, would he like to go?

A. I don't know if he knew anything about it or not.

Q. Well, the trip, was that at his—I mean he certainly knew about it?

A. Yes, sir, he approved of it, I mean he was willing.

Q. It wasn't any secret? A. Oh, no.

Q. How long have you had a driver's license?

A. About two years, I guess about two years.

Q. About two years?

A. Something like that.

Q. The balance of the highway was blacktop except this portion that was being repaired?

A. That's right, we had blacktop all the way on that trip except that one stretch in there.

Q. A two lane? A. Yes, sir, a two lane.

Q. What is the effect of a car going down a hill when you put it into a lower gear, what effect does it have on the car?

A. It slows it down, your engine runs up to a higher rpm. What it does, it pulls back on your engine.

Q. Your wheels will go around slower?

A. That's right.

Q. It will have a braking effect?

A. That's right.

(Deposition of George A. McDonald, Jr.)

Q. Was there anything to have prevented your mother to have started down that hill in low gear?

A. Nothing that would have stopped her.

Q. That's right.

A. No, and I really don't know why she didn't.

Q. You don't know?

A. No, sir, I really don't know because I could see and everybody else could see it was a steep hill, but maybe she thought the emergency brake would hold, but why she didn't gear it down up there; I don't know.

Q. You might have made it if she had?

A. Might have.

Q. That was the last opportunity you had?

A. That's right, that we the last time I said anything to her.

Q. Did you ask her to put it in low gear?

A. No. I mean up there on the summit was the last time I said anything to her.

Q. And that was the last opportunity that anybody had in going down that hill to change the method of operation?

A. That's right. Maybe she figured after we got started down, if the car did get to going too fast that she could get it in low gear.

Q. She actually wasn't experienced in that hilly country?

A. No, sir, she wasn't experienced in driving those mountains.

Q. These other people didn't know she wasn't experienced, did they?

(Deposition of George A. McDonald, Jr.)

A. Well, I don't think any of them were.

Q. And they were relying on her?

A. That's right.

Q. Especially that last defense, they were relying on her? A. That's right.

Q. She was the one that actually had control of the car and had had those last 30 minutes?

A. Yes, sir, that's right.

Q. So actually these decisions that were made, they were relying on her knowledge?

A. That's right.

Q. It was pretty apparent to you and should have been to your mother as you went down that hill her low gear would have been a wiser course or a safer course?

A. That's true, but you know how these mothers are, when they get in a tight place like that they don't want to take the advice of a kid.

Q. Well, you didn't say anything about what you thought would have been the safer course?

A. No, sir, that's right. If she had geared down on top of the hill before she got up top speed and used the emergency brake we would have made it.

Q. And you had that last opportunity on the top of the hill?

A. Yes, sir, we had the opportunity to do it.

Q. You have understood my questions?

A. Yes, sir.

Q. And you have answered them truthfully?

A. Yes, sir, I have answered them truthfully and to the best of my knowledge.

(Deposition of George A. McDonald, Jr.)

Q. Pass the witness.

Redirect Examination

Q. (By Mr. Pipkin): How about this statement, did the man sit there and write it down?

A. He wrote it down, yes, sir.

Q. Was it typewritten when it got back to you or hand written?

A. I don't remember whether it was typed or hand written, but I remember that my daddy read it and I signed it.

Q. How long did you continue under medical care after this statement was made?

A. Up until about November or December of 1953.

Q. And this happened in July? A. Yes, sir.

Q. Were you at home in bed when he came to take it?

A. Yes, sir—well, I was in a cast and in a wheel chair.

Q. What kind of a cast?

A. Well, it completely covered my foot and my leg and came up around my waist.

Q. Did you have some broken bones besides your head, your skull fracture?

A. My right leg was broken.

Q. Your right leg was broken and you were in a cast, in a wheel chair? A. Yes, sir.

Q. Was your father there all the time he was talking to you? A. Yes, sir.

(Deposition of George A. McDonald, Jr.)

Q. Now you say you didn't read the statement before you signed it? A. No.

Q. And you never have read the statement since you signed it, no time, nowhere? A. No, sir.

Q. It never has been read to you except when he was asking you these questions?

A. It never has been read to me except when he was asking me these questions.

Q. Has he shown you any statement that you signed with your signature on it? A. No, sir.

Q. In talking to you, this counsel here hasn't shown you any statement? A. No, sir.

Q. That you signed? A. None whatsoever.

Q. Have you been afforded any opportunity during this deposition to read this statement over to see what was in it?

A. I imagine I could have.

Q. I say have you been afforded any opportunity to read a statement signed by you with your signature? A. No.

Q. You were acquainted with Mrs. Aronson?

A. That's right.

Q. And knew her when you saw her?

A. That's right.

Q. How long have you been acquainted with her?

A. For about three years.

Q. Do you know whether she drove a car some?

A. She drove her husband's car some.

Q. Did she live in Fairbanks or not?

A. Yes, sir, she lived in Fairbanks.

Q. You say she had been out in the car with

(Deposition of George A. McDonald, Jr.)

your mother and father? A. Yes, sir.

Q. Is that the Alcan Highway? A. Yes, sir.

Q. Is that mountainous?

A. It is very mountainous, and most all inclines are steep.

Q. During all this time did you ever hear Mrs. Aronson, yourself, make any statement about whether you should go forward or not?

A. No, not definite—I mean just come right out and make the statement.

Q. I will ask it this way, did you ever hear anybody in the car give any concern about—I mean in the sense that—you don't remember any exact words or conversation after this long time, do you?

A. No.

Q. Do you remember anything she said about wanting to go on, to stop or to go back?

Mr. Cobb: I object to that as leading.

Q. All right, answer it.

A. No, I don't remember any such thing.

Q. Now was the conversation in the car at the time you got out and looked at the puddle to see that you had no brakes, that the brake fluid was out? A. The conversation was in the car.

Q. Now, you say when you got down there to this man's place, you stopped, you say you stopped at a Bar, at a roadside place, what point was that?

A. That was 56 Miles.

Q. That's the only place you stopped before you got to the Pass?

A. That's right, as far as I can remember.

(Deposition of George A. McDonald, Jr.)

Q. Now——

A. I mean to try to get the brakes fixed that was the only place we stopped.

Q. That was the only place you stopped, when you got to the intersecting road, something up there, I believe you said you stopped?

A. We stopped, yes, sir.

Q. Any houses or garages or anything there?

A. No, sir.

Q. Just wilderness, as you told the counsel here?

A. That's right.

Q. Was that a lodging place there at 56-Mile Post, where that man came out I am talking about?

A. Not that I recall. I believe it was just a bar and a place to eat.

Q. Any houses there or anything?

A. No, sir, I don't believe there were.

Q. How much education have you had?

A. I went through the eleventh grade.

Q. Did you hear any statement at the Pass or anywhere else by anyone inside the car, or were there any statements made in your presence and hearing as to whether or not it might be dangerous to make that descent without the foot brake?

A. Yes, sir, there was something said about that.

Q. Do you recall who said it?

A. No, I don't.

Q. Did you get out and walk around that Pass, at the Pass point, McDonald?

A. No, no one got out.

(Deposition of George A. McDonald, Jr.)

Q. No one got out. State the facts whether or not it was discussed in the car that the descent was shallow or deep as to the mountains or road ahead of you?

A. You mean whether there was any statement made or not as to the grade?

Q. Yes, sir, as to whether or not there was a grade.

A. Well, I can't recall, I mean not any definite words or anything, but I imagine there was something said about it being pretty steep in the conversation, but I mean I just can't really recall.

Q. We are not asking you to recall word for word conversations that far back, the effect of the conversation is about all you would be expected to remember. I am asking you did anyone there say, "Let's go back" or "Let's stop"—

Mr. Cobb: That's leading and suggestive, and I object to it on that ground.

Q. Did anyone say they wanted to go forward or you ought to go forward?

Mr. Cobb: That's leading and suggestive, and I object to it on that ground.

Q. State whether or not in your presence and hearing there was anything said in the car by anyone to the effect as to whether or not you should go forward or remain where you were or go back, any of the three? A. No.

Mr. Cobb: I object to that on the same ground.

Q. You have stated in answer to that question

(Deposition of George A. McDonald, Jr.)

that no one said anything about whether you should go forward or not?

A. Well, no—I mean they just talked about—well, I imagine they said—I am pretty sure that something was said about whether they should go on or go back or not and that's when they talked about it.

Q. Do you remember who did the talking?

A. All of them.

Q. Everybody entered into the discussion?

A. Everybody.

Q. Did that include Mrs. Aronson or not?

A. Mrs. Aronson and all.

Q. Can you state where or not she gave her consent or dissent about going, continuing?

A. No, I can't, I can't make any statement on that because——

Q. Do these——

Mr. Cobb: Let him finish his answer.

A. Because I don't recall anything definitely that she or anyone said, but I do state they entered into the discussion.

Q. Can you state here what was the outcome of the discussion as to their attitude, if they expressed any attitude? A. Yes, sir.

Q. What was it? A. To go on.

Q. Are you purporting to say here that your mother made that decision as to whether to go down the mountain from Thompson Pass?

A. No, it wasn't her decision. Everyone decided on it.

Q. Did you enter into the decision?

(Deposition of George A. McDonald, Jr.)

A. No, I was keeping quiet.

Q. What was your decision about it?

A. It really didn't matter to me, I mean it was really up to them.

Q. State whether or not to you sitting there, was there any apparent concern about whether you should go on down it or not?

Mr. Cobb: That's leading and suggestive.

Q. Let him answer it.

A. You mean what I felt?

Q. I mean was it apparent to you as to the group in the car as to whether there was any apprehension or fear about going down the mountain?

Mr. Cobb: The same objection.

A. Yes, sir, there was a fear in going down.

Q. What was the reason for that?

A. No brakes, no foot brakes.

Q. State whether or not there was any discussion as to that?

A. Well, my mother made the statement that the emergency brake was good, I imagine. I mean she had used the emergency brake before and it was good. It was a good emergency brake, and you can gear a car down and use your emergency brake like that and it will slow you down, and I imagine it was on.

Q. Did you hear Mrs. Aronson say she wanted to get out and rather not go on down?

A. No, sir.

Q. Were you present and could hear everyone in the car? A. I was sitting right there in the car.

Q. Were you wide awake or asleep?

(Deposition of George A. McDonald, Jr.)

A. We were all wide awake.

Q. When sitting upon the Pass with your lights how far would you say you see down the road ahead of you?

A. I would be afraid to say because I don't know. I would say maybe fifty to one hundred feet.

Q. Is it your statement or not you had ever been over that road before?

A. I had never been on that road before.

Q. Now back there I think you took a turn there on your testimony that I didn't understand and I got a little confused back there, you were talking about the time you heard the noise under the car, the section of the road before you reached this Lodge, Mile Post 57 or 56, whichever it was, I am referring to the time you heard the noise that the car was stopped——

A. We heard the noise just as my mother straddled the pile of dirt, and when we heard the thump she pulled right on off, and I asked her to stop to see if it punctured the gas tank.

Q. How far did she drive after you heard the thump? A. Not over two hundred feet.

Q. Which side of the road were you on when you stopped? A. On the left.

Q. And that is when you got out—is that when you got out?

A. Yes, sir, as soon as she stopped I got out and went around back of the car and looked.

Q. How long did the car remain stopped at that point?

(Deposition of George A. McDonald, Jr.)

A. Anywhere from five to ten minutes.

Q. Had you gone to Church down there at Seward? A. No.

Q. Did you go to Church any time from the time you left Fairbanks at all, did you go to any of the Church services anywhere?

A. Not that I can recall.

Q. Not that you can recall; at what speed do you estimate the car was driven from the time of hearing the thump under the car until you got down to the 56-Mile Post, that is, the Lodge?

A. I would say about thirty.

Q. About thirty?

A. Thirty to forty, something like that, slow. We drove slow.

Q. Do you have any recollection of anyone saying that they were afraid and wanted to go back or stop and get out, any of those three?

Mr. Cobb: I object, it is leading and suggestive.

A. No, sir, I don't.

Q. You do not have any such recollection?

A. No.

Q. When your car left Fairbanks, what was your understanding as to where you were going?

A. That we were going to Anchorage and see this Poe Hamilton and go by Valdez to that Revival. That's the way I understood it to be.

Q. Did you get out anywhere on the way to Anchorage to look at the scenery or any mountain views?

A. Not that I can recall.

(Deposition of George A. McDonald, Jr.)

Q. Was any discussion had about the scenery out from Anchorage? A. About the scenery?

Q. As you went along, as to whether there was any spectacular scenery to be seen?

A. Just some glaciers.

Q. Where were they? A. All over.

Q. Was that a vacation trip you all were on?

A. More or less, and we were going to see Miss Hamilton and to the Revival.

Q. Who bought the gasoline?

A. They all put in together.

Q. How do you mean all put in together?

A. Just like a pool, when they bought gasoline they would all pay for it.

Q. Do you remember how many places you gassed up? A. No, sir, I don't.

Q. Well, how would they go about making this pool up, pass the hat?

A. Well, so to speak, yes, sir.

Q. I don't mean that literally, I mean would they just see how much it was?

A. When they would find out how much it was, they would all put in so much money and pay for it. There was four of them and it was a lot cheaper that way.

Q. Who paid at the motel?

A. All of them. They paid their own share for the room.

Q. Do you know what you mean when you go Dutch?

(Deposition of George A. McDonald, Jr.)

A. That's what they were, going Dutch, each one paying his own way.

Q. State whether or not there was any understanding about who would defray the expenses of this trip when you left Fairbanks, was any discussion had in your presence about it?

A. Not in my presence, no.

Q. Was there one of these Baptist Churches in Anchorage, do you know?

A. Yes, sir, there was a First Baptist Church in Anchorage?

Q. Were you there at any time when you could have made the services, say at night anytime?

A. I don't believe so. I don't remember, really.

Q. But your recollection is you didn't make any Church service at all? A. That's right.

Q. Although you never reached Valdez?

A. That's right.

Q. Did anyone along the way—do you recall whether anyone made any suggestions to your mother about how to drive or where to drive?

A. Not that I can recall.

Q. Now counsel asked you a number of things about what might have happened or what could have happened in your judgment, if your car had had foot brakes this accident would not have happened either, that is, you control a car like that on a road like that with foot brakes if there is any fluid in the line?

A. Absolutely. It definitely would not have happened if we had foot brakes.

(Deposition of George A. McDonald, Jr.)

Q. These curves, did they go around the mountain sharply or did they turn slightly and go down?

A. No, just weave.

Q. Just weave, were they sharp enough you couldn't see across down in the road ahead of you or what are the facts?

A. Some of them would go around the side of the mountain where you couldn't see around them and some of them would go straight down and you could see around the curve.

Q. How far were you actually down the mountain before you had the accident?

A. I would say about three miles.

Q. During that time state what action your mother took in regard to the operation of driving the car.

A. Well, she would keep it on her side of the road as much as possible, and when she would hit a curve she would take the middle or the inside of the curve and go on around.

Q. You hadn't driven much up until that time, had you? A. Not too much, no, sir.

Q. Looking back on it now and the observation you made at that time, and based on the experience you have had in driving, did she drive skillfully down the road? A. Yes, sir, she did.

Mr. Cobb: That is objected to on the grounds it is leading and suggestive.

Q. How did she drive down the mountain?

Mr. Cobb: The same objection.

A. As carefully as she could at that time.

(Deposition of George A. McDonald, Jr.)

Q. Did she have both hands on the wheel?

A. Yes, sir.

Q. Was she hysterical?

A. No, sir, she kept her head.

Q. Do you recall whether anyone was making any suggestions to her or not about what she should do in this emergency?

A. No, they were all too scared. In considering what it was, my mother drove very sensibly going down that mountain because you take someone that is an experienced driver on mountains like that and something like that happens, nine out of ten of them will go to pieces.

Q. Do you recall whether or not she held onto the steering wheel or turned it loose or anything?

A. She held onto that thing all the way down.

Q. Was there any way going over that road—do you recall the outline of the road pretty well in your mind from Thompson Pass down?

A. Pretty fair.

Q. And you have stated, I believe, if I am not correct me, state whether or not it is within your knowledge your mother had ever driven this particular Pass?

A. No, sir, she had not.

Q. She had never driven it?

A. No, sir.

Q. Did you hear anyone make any statement in the car as to whether or not they had ever been to Valdez?

A. I am pretty sure none of them had.

Q. None of them had?

A. No, Mr. and Mrs. Dickerson had gone down

(Deposition of George A. McDonald, Jr.)

there for a Church meeting or something but I don't believe the others had.

Q. You have made the statement here that if your car had been put in low gear she could have probably controlled it better or words to that effect?

A. That's right.

Q. How far down the road would that become apparent, in other words, could you see the road down ahead as to how steep it was getting, very far beyond your lights? A. Yes, sir, you could.

Q. How, in the darkness?

A. You mean how far?

Q. Yeah.

A. Oh, I don't know, maybe two hundred feet, something like that.

Q. That's within the range of your headlights you mean?

A. Yes, sir, within the range of the lights.

Q. Was the car in gear when it started down the hill?

A. She had it in the down position, in third gear.

Q. It was in position? A. Yes.

Q. State whether or not she made any attempt to use her hand brake?

A. Yes, sir, she did. She set the hand brake.

Q. Before starting down?

A. No, after starting, after she picked up some speed.

Q. Did you observe whether or not the hand brake was holding? A. No, it did not hold.

(Deposition of George A. McDonald, Jr.)

Q. When was it with reference to the time she put the hand brake on that she attempted to change the gears?

A. She pulled the hand brake up and tried to set the gear.

Q. State whether or not the car ever took any gear or not after that? A. No, it did not.

Q. Well, I believe that's all.

Recross Examination

Q. (By Mr. Cobb): Let me get a couple of things straight in my own mind. I know it is getting late and it is longer than you thought but we will get it over in a minute if you will just bear with us. As I understand, it is your testimony you stopped at the top of this Pass, before you went over it, and why did you stop at the top?

A. Because we saw that it was a drop from there on.

Q. That was apparent to your mother?

A. Yes, sir, it was apparent and so she stopped there and had the prayer meeting, and I don't know any definite words that were said, but they did discuss as to whether to go on or not.

Q. I was asking you as to the question whether it was apparent as to it being steep? A. Yes.

Q. And up to that point, except the thirty minutes, your mother had done all the driving?

A. Yes, sir, and the thirty minutes I drove was right outside of Anchorage and it was broad daylight.

(Deposition of George A. McDonald, Jr.)

Q. She was supposed to do all the driving?

A. Well, I imagine she was but I doubt if it was understood like that between her and my daddy though.

Q. Neither so far as her and the other people in the car? A. That's right.

Q. And she wasn't supposed to follow their suggestions or anything like that? A. That's right.

Q. She was the one in control of the car?

A. She was the one in control of the car and had charge.

Q. When you started off the steep hill it was apparent to you and your mother and everybody there that it was a steep hill? A. That's right.

Q. And you say you first noticed the gear in third position but she put it in low to start it off and then first? A. No.

Q. You can start off in high?

A. On that type of transmission you can start off on third gear and let off the clutch and it will change into fourth.

Q. From a flat standing still?

A. From a flat standing still.

Q. Your mother had driven that car many times before? A. Yes, sir.

Q. She knew how the gears were? A. Yes.

Q. There was nothing to have prevented her to have started off in low gear?

A. Nothing whatsoever to prevent it.

Q. And nothing to prevent her to start off with a combination of low gear and no brakes?

(Deposition of George A. McDonald, Jr.)

A. Nothing in the world.

Q. I am talking about this decision when they decided to go ahead, nobody was telling your mother how to drive at that point? A. No, sir.

Q. But whether to go ahead with or without the foot brakes? A. That's right.

Q. That's all the decision was about?

A. Yes, sir. They were trying to decide whether to try to make it down the hill without the foot brakes or not.

Q. But nobody made the decision but your mother whether to go down in third gear or low gear? A. That's right.

Q. That was her decision? A. That's right.

Q. And nobody attempted to exercise any control over her? A. That's right.

Q. And Mrs. Aronson and Mrs. Dickerson were in the back seat? A. That's right.

Q. And it was apparent at that point you were going down a steep hill, and if you had thought about it you would have realized you had to get it in low gear even before you started? A. Yes, sir.

Q. And if you had stopped to think about it, it would have been apparent you should have started out with the hand brake set, is that right?

A. That's right.

Q. And the only reason you think your mother didn't do it, she overlooked it or just didn't think?

A. Probably scared and just didn't think.

Q. But she didn't have any discussion with these

(Deposition of George A. McDonald, Jr.)

other ladies at that point as to how she was going to proceed down that steep hill? A. No.

Q. Although they may have been aware of the fact it was a steep hill and aware of no foot brakes, they weren't aware of how she was going to proceed down that hill? A. That's right.

Q. Mr. Pipkin asked you based on your experience now in driving and your remembrance and recollection of what happened on that occasion, had she started down this hill in first gear and the hand brake set she probably could have made it?

A. She would have made it I am pretty sure because I have driven several cars with the same transmission setup and everything. In fact, I owned one until a couple of weeks ago the same way.

Q. Did you drive it over mountains?

A. Yes, sir.

Q. When making a descent did you shift it up?

A. I had one that bad at Pala Duro Canyon at Amarillo. I had about a mile or two mile hill to get to the bottom of the canyon and I geared it down going down. And the way I do it, after the transmission slows it down so far, it just starts turning free and won't hold, but going down that hill I pushed the clutch in and let it roll and pulled the clutch back out and it would grab, and I never did use my brake.

Q. You would go down about thirty miles an hour?

A. About thirty miles an hour is about what I would go, and I would get it up to forty or forty-

(Deposition of George A. McDonald, Jr.)

five and let my clutch out, and I never did touch my brake.

Q. That was the same sort of setup?

A. Yes, sir, the same situation, transmission and everything. Where she made her mistake where she was going this fast—that whole drop I had I could be driving eighty miles an hour and stick it in second, you just have to know how to do it. Her rear wheels were turning the same speed of the engine, and instead of letting her engine up and then putting it in second, she didn't do that. I can be going eighty miles an hour and floorboard it and run it up as high as it will go and then it will slip right on in.

Q. None of these other ladies attempted to exercise any control or tell your mother how to go about it? A. That's right.

Q. On any part of your trip they didn't exercise any control over her mechanical manner of driving?

A. No, sir, so far as I know they all kept quiet as to how she drove.

Q. She was the one making the decisions?

A. She was making the decisions as a driver.

Q. There wasn't any equal decision between them? A. No, sir.

Q. That's all.

Further Redirect Examination

Q. (By Mr. Pipkin): Was there anything to keep Mrs. Aronson or anybody on the back seat of

(Deposition of George A. McDonald, Jr.)

that car at the time you were on that Pass and fixing to descend to see that it was a steep descent?

A. No, sir, there wasn't.

Q. Did Mrs. Aronson enter into the discussion?

A. I imagine she did.

Q. Did you notice whether or not she was doing any of the praying? A. Sure she was.

Q. That's all.

Mr. Cobb: That's all."

[The following matter is from the District Court Reporter's Transcript:]

Mr. Johnson: The plaintiff rests on the question of negligence, Your Honor.

(Mr. Clasby moved for the dismissal of this cause and presented argument, and Mr. Johnson resisted the motion.)

Mr. Johnson: I suggest, Your Honor, that you continue the matter until tomorrow morning without decision.

The Court: The only thing that I am wondering about is whether you gentlemen at ten o'clock wish to present further authorities and argument and at that time I will rule after hearing your arguments.

Mr. Clasby: I plan on seeing what I can find in the cases. [56]

The Court: And I, of course, am going to see what I can find. Very well, this case will be continued until ten o'clock tomorrow morning, and Court will adjourn until ten o'clock tomorrow morning.

(Thereupon, at 4:30 p.m., October 9, 1956, an adjournment was taken until 10 a.m., October 10, 1956.)

Fairbanks, Alaska, October 10, 1956

Be It Remembered, that the trial of Cause No. 7728 was resumed at 10:00 a.m., October 10, 1956, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

Clerk of Court: Court is now in session.

The Court: Gentlemen, are you ready to proceed in Civil Cause 7728?

Mr. Johnson: The plaintiff is ready.

Mr. Clasby: We are ready, if the Court please.

The Court: Very well.

Mr. Clasby: At this time I would like the Court's permission to put on out of order a witness whom I have available and this is the most convenient time for him to testify, if I may do that and then go back to my argument.

The Court: Any objection, counsel?

Mr. Johnson: The only objection I might have would be as to whether or not counsel intends to use this witness' testimony in support of his present argument. If he does, I don't believe it is proper order. Otherwise, I don't have any objection. [57]

Mr. Clasby: I don't intend to. I think the Court can exclude it from consideration also.

The Court: Yes. You wish to put the witness on at this time out of order, the evidence to be con-

sidered in the defense, if you get to the defense, but without prejudice to your argument?

Mr. Clasby: That is right.

The Court: Very well, the witness may be sworn.

Mr. Clasby: Will you come forward, Mr. Thies, and be sworn?

DONALD WILLIAM THIES

called as a witness by the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Clasby): Would you state your name, please? A. Donald William Thies.

Q. Do you live in Fairbanks, Mr. Thies?

A. Yes, I do.

Q. You have lived in Fairbanks all your life, have you not?

A. No, I haven't. Twenty-one years.

Q. Twenty-one years. That is coming pretty close to it. What is your occupation?

A. I am foreman for Alaska Freight Lines.

Q. What during the last twenty years has been practically [58] your occupation?

A. Truck driver, mechanic, and handling freight.

Q. Out of Fairbanks? A. Yes.

Q. Were you acquainted in that connection with the highway between here and Valdez?

A. Yes, sir.

Q. Did your employment take you over that highway? Yes, sir; it did.

Q. For how long have you been driving that highway? A. Since 1942.

(Testimony of Donald William Thies.)

A. With considerable frequency?

A. More in the last year than I have for, I would say, about six years.

Q. Prior to that you drove it considerably also?

A. Yes.

Q. Are you familiar with the condition of the highway over Thompson Pass after the installation of blacktop in 1953? A. Quite well, yes.

Q. Will you describe for us in your own words the approach to Thompson Pass and then the highway down on the Valdez side of Thompson Pass?

A. I would say approaching from the relief cabin——

Q. Would you go by mile posts or the approximate mile posts? [59]

A. I believe Thompson Pass is 26 Mile and the road levels out——

Q. You started to talk about the relief cabin.

A. Coming up to the relief cabin it is quite a pitch. You would notice it right away in a car or truck more than in a car. As you approach the top of Thompson Pass it slightly levels off. I would say it levels off approximately for 1,000 feet, and then it has a gradual drop for approximately a quarter of a mile, and then it might accidentally—I mean it might level off just a short distance, and then it has quite a drop from there on down.

Q. What is the character of the road with reference to curves approaching the top and then going down the other side as they might restrict a person's vision?

(Testimony of Donald William Thies.)

A. If it was closed by fog banks, I mean, or clouds, I would say that a person that even knew the road wouldn't drive more than 15 to 20 miles an hour, because you cannot have any visibility; your headlights don't help you. All you can do is try to stay in the center line of the road or at the bank along the road. Even going through Thompson Pass you don't even notice the banks as you go through when it is closed in. You are just driving by what you can see of the road.

Q. Are you aware you are at a summit when it is closed in?

A. If you drive the road all the time, yes, but if you have never been over the road but a couple of times, you would never [60] know it.

Q. Again back to my other question, Mr. Thies, what is the character of the road with reference to turns that might restrict visibility, both going up from this side, as you near the summit, and going down the other side after you pass beyond the summit?

A. I would say from the relief cabin you would have two "S" corners approximately 2,000 feet from the top of Thompson Pass. Then the road fairly straightens out so that you would have, I say, 1,500 feet visibility in front of you. You could say it straightens out really over the top of Thompson Pass and makes a gradual turn to the left for, I would say that you could see approximately 1,000 feet in front of you. Then I would say a quarter

(Testimony of Donald William Thies.)

of a mile from the top of Thompson Pass is starts making winding turns again.

Q. That is the point where the descent becomes more steep, is it? A. That is right, yes.

Mr. Clasby: I have no other questions.

Cross Examination

Q. (By Mr. Johnson): How far is this relief cabin from the summit?

A. From Thompson Pass?

Q. Yes.

A. I would say approximately half a mile.

Q. I take it you go over this pass at night [61] quite considerably, do you not? A. Yes, sir.

Q. In both summer and winter?

A. Right.

Q. Does it have a tendency to cloud in or fog in at the summit even in the summertime?

A. Very often, yes.

Q. And are those clouds usually cloud formations, or is there ground fog, or what would you call it?

A. I think it would be more cloud formations.

Q. That hang right around the summit?

A. That is right, yes.

Q. What is the percentage of grade on the first quarter mile? I believe you said after you cross the summit or the top you start down, for a quarter of a mile you said the grade was rather gradual. What would you estimate the grade to be?

A. I would say six per cent.

(Testimony of Donald William Thies.)

Q. And then it increases after that; is that correct?

A. Yes, quite considerably, and then it levels off again.

Q. What would be the percent of grade below that approximately?

A. I would say eight to ten percent.

Q. That is fairly steep grade, is it not?

A. Yes, it is. [62]

Q. Even six percent in an ordinary road is a rather steep incline; is that not true?

A. Yes.

Q. Do you know about how long the descent is on the Valdez side of the pass before it levels off on the bottom of the canyon?

A. I would say approximately nine miles.

Mr. Johnson: That is all.

Mr. Clasby: That is all.

The Court: Do you think you gentlemen can establish by this witness whether or not the relief cabin that he speaks of is the same place that the party stopped prior to when they went to the summit? I haven't heard anything about a relief cabin before.

Mr. Johnson: I believe I asked him about how far the relief cabin was and he said half a mile from the summit, and my recollection of the testimony is that—well, may I continue with this witness a little?

The Court: Yes. I wonder if the witness can tell us at what mile the relief cabin was located?

(Testimony of Donald William Thies.)

Q. (By Mr. Johnson): Do you know at what mile post the relief cabin is?

A. I would say about 26½ miles or 27, I believe.

Q. What sort of a cabin is it?

A. It is actually a Road Commission Camp. [63] They have put up a concrete building, but what I spoke of was an old relief cabin there years ago, but there is a concrete building there now that the Road Commission keeps their maintenance equipment in.

Q. Is that used by tourists for any sort of overnight accommodations or anything? A. No.

Q. Are any meals served there?

A. Not that I know of.

Q. Are there facilities for warming or anything of that sort?

A. I believe they would let you in if the road was closed, yes.

The Court: I believe you should be restricted as to what it was at the time of the accident, rather than what it is today.

Mr. Johnson: I beg your pardon, Your Honor.

Q. (By Mr. Johnson): The accident that is involved in this case happened in the summer, in July of 1953. Would you say that this relief cabin had been changed since that time, or do you recall when it became—— A. That I couldn't answer.

Q. You don't know whether it was before or after that? A. No, I don't. [64]

Q. Has it been a Road Commission garage or

(Testimony of Donald William Thies.)

maintenance shed for quite some time, would you say? A. Yes, it has.

Q. And you have been driving over this road for several years?

A. I have drove since 1942 off and on, yes.

Q. You have been familiar with it ever since?

A. Yes.

Q. During that time it changed from an old relief cabin into a——

A. ——a maintenance shop.

Q. But you don't know when?

A. No, I don't.

Q. Now, is there some sort of a garage or filling station at 56 or 57 Mile, do you remember?

A. There was a roadhouse there, I believe, at 60 Mile.

Q. In that vicinity. What is the name of that?

A. There is Tea Kettle, for one.

Q. Tea Kettle? A. Yes.

Q. Was that there during the summer of 1953?

A. Yes.

Q. Is there anything between that roadhouse there and Valdez? A. Yes, there is 35 Mile.

Q. 35 Mile Post, that would be about 10 miles north of Thompson Pass; is that correct?

A. Yes.

Q. Was that there during the summer of 1953?

A. Yes.

Q. What type of accommodation is that, or what is it?

A. It is a roadhouse with a filling station and I

(Testimony of Donald William Thies.)

don't know if they do any work on cars or not if they have trouble. That I couldn't answer.

Q. And you say that is at 35 Mile Post?

A. Yes.

Q. Is there anything between that and the summit? A. No.

Q. Beyond—

A. That Road Commission was the only building in between there.

Mr. Johnson: I believe that is all.

Redirect Examination

Q. (By Mr. Clasby): Going up the summit and in the area about the summit, how wide is the blacktop? A. That has a 22-foot span.

Q. Is there any shoulder beyond the blacktop on the righthand side of the road going toward Valdez in the area around the summit? [66]

A. It varies. Some places it has and some places it has none. Very little, I would say.

Mr. Clasby: I think that is all.

Mr. Johnson: That is all.

(Witness excused.)

Mr. Clasby: May it please the Court, we have one other witness on the same subject and I ask for permission for Mr. Cole to examine him.

The Court: Any objection, counsel?

Mr. Johnson: No objection.

Mr. Cole: We call Jim Groves to the stand.

JAMES E. GROVES

a witness called by the defendant, after being duly sworn, testified as follows:

Direct Examination

- Q. (By Mr. Cole): State your name, please?
A. James E. Groves.
- Q. How old are you, Jim?
A. Twenty-eight.
- Q. What is your occupation?
A. Truck driver.
- Q. How long have you been a truck driver?
A. I have been driving up here for four years.
- Q. In Alaska? [67] A. Yes, sir.
- Q. Did you drive truck before you came to Alaska?
A. Yes.
- Q. Where did you drive? A. Idaho.
- Q. Where was that?
A. Sand Point, Idaho.
- Q. Is there a lot of mountainous country around Sand Point, Idaho?
A. Yes, sir. Yes, narrow, rough roads.
- Q. So you spent most of your time driving over narrow, rough roads? A. Yes, sir.
- Q. In Alaska you have been driving four years for whom?
A. Gene Rogge, Sourdough Freight Lines.
- Q. Since you have been driving in Alaska for four years, between what points have you been driving? A. Fairbanks and Valdez.
- Q. Exclusively pretty much? A. Yes, sir.

(Testimony of James E. Groves.)

Q. How many trips a week do you make between Valdez and Fairbanks?

A. An average of two trips.

Q. You average two trips a week; that means you cross over Thompson Pass four times a week?

A. Yes, sir.

Q. And that means you would make approximately 200 trips between Fairbanks and Valdez in four years? A. Yes, sir.

Q. And you have crossed over Thompson Pass approximately, since you have been here during the last four years, 400 times?

A. Yes, sir; I guess so.

Q. Approximately, of course. A. Yes.

Q. That makes you pretty familiar with Thompson Pass and the entire highway between here and Valdez? A. Yes, sir.

Q. Have you ever driven over Thompson Pass at night when it is dark?

A. I would say seventy percent of the time is going over Thompson Pass in the dark.

Q. And you have driven over Thompson Pass when it was foggy? A. Yes, sir.

Q. Characteristically, when it is foggy on Thompson Pass is it just light fog or dense fog? What is the general fog condition there?

A. Ninety percent of the time when it is foggy up there you can't see as far as from here to the courtroom door there (indicating). [69]

Q. In other words, when there is any fog at Thompson Pass it is so foggy that you can hardly

(Testimony of James E. Groves.)

see across the road? A. That is right.

Q. And, of course, you have driven over Thompson Pass at night there in the fog? A. Yes.

Q. The visibility is very restricted at that time?

A. It is very poor.

Q. Traveling from Mile 56 towards Valdez— incidentally, let me preface that—what is the Mile Post approximately at the top of Thompson Pass?

A. 25 Mile.

Q. As you are traveling towards Valdez from Fairbanks and you start to climb towards Thompson Pass, what Mile Post approximately does the climb begin? A. From—

Q. I am sorry. Perhaps I didn't make my question clear, but when you are traveling from Fairbanks towards Valdez, at what Mile Post do you begin the climb of Thompson Pass, roughly?

A. Well, actually, to go into the Pass, you would be starting in at about 34 Mile, but going from Fairbanks to Valdez, right at 47 Mile you start climbing, and any person that hadn't been over it frequently enough, as I have, you just figure you are starting over the Pass.

Q. At about Mile 47 you start up? [70]

A. At about Mile 47 you start up and you go up and down and up and down. Actually, you don't know where you are at.

Q. So you climb over between Mile Post 47 and Mile Post 25? A. Yes, sir.

Q. And that climb is not a straight line climb?

A. No.

(Testimony of James E. Groves.)

Q. During the climb are there dips and periods of time at which one might well believe, as a careful driver, that they were beginning to go down hill and not know that there was a further climb beyond?

Mr. Johnson: We object to that, if the Court please, as being leading and suggestive. I think he should let the witness tell what he saw or knows about it.

The Court: I think this question may stand. He may answer it.

A. Yes, there is particularly one hill, 40 Mile hill, where you climb up for a while and then you go down and then you level off and go around a curve, so a person naturally wouldn't know what is ahead, no.

Q. (By Mr. Cole): As you approach the summit at Thompson Pass and getting very close to the summit of the Pass, what is the nature of the grade in that area? Is it a steep climb? A. No. [71]

Q. Or is it pretty much a gradual climb?

A. It is a gradual climb. I would say there isn't any of it over four percent grade.

Q. What is the nature of the roadway at the top of Thompson Pass? Is it level or is it pretty level there, or when you get to the top do you immediately start down a steep incline?

A. When you get to the top it is more or less level for a little ways, I would say two or three hundred yards, but there is nothing that is real steep right at the top.

(Testimony of James E. Groves.)

Q. How far does one travel from the actual summit or the top of the Pass until the highway becomes steep, what you might call steep, or the road becomes a large grade?

A. I would say a mile and a quarter to a mile and a half.

Q. So after you have reached the summit and started down you travel over fairly level country for about a mile and a half, at which point the road becomes steep? A. Yes, sir.

Q. If you were driving an automobile over Thompson Pass at night, in the fog, would you know when you actually—would you know definitely when you came to the top of the Pass?

A. If I was a total stranger to the road, no, I wouldn't know.

Q. How far would you be down the other side before the [72] average driver would realize that he was traveling down a precipitous mountain pass slope?

A. Well, I would say you would be over half or three-quarters of a mile before you would ever realize it, if you went according to the road that you had just previously been over.

Mr. Cole: May we use the blackboard?

Q. (By Mr. Cole): I hand you this piece of chalk and ask you if you would draw on the blackboard the general contour of the road in the area of Thompson Pass, say, from one mile on the Fairbanks side of the summit to three or four miles on the other side of the summit?

(Testimony of James E. Groves.)

Mr. Johnson: We object to that on the theory that he is not qualified, your Honor. There has been no basis laid for that type of testimony. He doesn't show he is an engineer or made any surveys or anything as to the contour.

The Court: He has testified to his familiarity with the road. Now counsel asked him if he is able to do what he asked him.

Q. (By Mr. Cole): Jim, on the basis of your experience and traveling over the Thompson Pass area, are you able to draw the contour of the road from approximately one mile on the Fairbanks side of Thompson Pass to three or four miles on the Valdez side of Thompson Pass? [73]

A. I would say I would.

Q. Would you please do so?

A. Right here you have 27 Mile Road Commission snow camp, coming from Fairbanks. Then on a straight—it is more or less level up to the Road Commission camp that is at 27 Mile, then you make a sharp curve there and then you go up hill on, I would say, a four to five percent grade (witness drawing sketch).

Q. Excuse me, would you mark four to five percent grade in there?

A. (Witness marked sketch accordingly.) It is approximately 200 feet long, and then you go up and wind a little bit and then you come to the top of the Pass. Right before you hit the top of the Pass, I would say it is about a two percent grade right in here (indicating), and then right in here

(Testimony of James E. Groves.)

(indicating) would be the top. Then there is a slight curve at the top, oh, about a 30-degree turn. Then it gradually slopes down about, this grade right here (indicating) would be about three percent, and then you go around a corner about 30 degrees and then it starts down.

I have run out of room here.

Q. If you want to continue this drawing right here from this point, you may do so.

A. It starts down and it curves, I imagine, let's see, there are three curves in there. There is three curves and then [74] you come across this flat stretch about $\frac{1}{4}$ mile wide, and then you go around what they call the old 400-foot pitch. It is a fairly sharp curve. It is just a little more than normal for Alaska highways, and then you go around the curve and down to a little flat stretch about 200 or 300 yards long. Then you start down four miles—it is a little more—six to eight percent, and four miles long.

When you get to 21 Mile there is an "S" turn. Then it straightens out and comes down to 19 Mile, which is at the bottom.

Q. On the basis of your earlier testimony, would you mark the point at which you would estimate you testified that a driver driving over this highway for the first time in the conditions of darkness and fog would probably realize you were then descending a mountain pass?

Mr. Johnson: We object to that as calling for a conclusion by the witness which he isn't qualified to

(Testimony of James E. Groves.)

make, your Honor. After all, it would be simply his own idea. There is no basis in the record for any such question.

The Court: He may answer, if he is able.

A. I would say from this point here, which is the top of four-mile hill to here (indicating) is the bottom, a person wouldn't have to go over a mile, three-quarters to a mile, and he would realize by then that he was in steeper country than he bargained for—you wouldn't go over a mile. [75]

Q. But you probably wouldn't know that before that point?

A. If it was foggy and at night, you wouldn't know that, no.

Mr. Cole: That is all.

Cross Examination

Q. (By Mr. Johnson): Mr. Groves, what do you mean by a three percent grade?

A. Now, for instance, if that was level, I would say a three percent grade was about like that (indicating). A six to eight percent grade would be going about like that (indicating).

Q. Yes, but I mean: how much drop is that in 100 feet, for instance, to make it a six percent or a three percent grade? Is that the way to measure it?

A. Well, engineers do, I guess.

Q. But you have no particular——

A. I would have no—I would have to get my pencil and paper out.

Q. Well, now, this fog that you speak of, is

(Testimony of James E. Groves.)

that usually ground fog or is that cloud formation, or what, as a general rule?

A. As a general rule I believe it is a little of both, which lays right on the highway, and you can't see over 20 feet ahead of you.

Q. Does it ever lay up off the highway a little?

A. I have never seen it lay off the highway.

Q. I just wondered if you had ever seen it. Then, it is your opinion that this is probably more ground fog than it is a cloud formation, since a cloud formation might move up and down, or something of that sort, might it not?

A. Well, guessing, I would say it would be more or less ground formation, ground fog. There wouldn't be any clouds.

Q. You say that the top of this summit is about two to three hundred yards, I think you said, once you reached the top?

A. To reach the top you travel about 300 yards, yes, before—

Q. And that is comparatively level; is that correct? A. It is about two percent grade, yes.

Q. Where does this grade of two percent stop?

A. The two percent grade would be from the Valdez end.

Q. I am talking about when you leave the snow shack or the snow shed you talked about and start up, there is a three percent grade to begin with, and then you go around that curve, or is that four percent?

A. Just before you get to the top, this is the

(Testimony of James E. Groves.)

snow camp, you climb a grade here which is four to five percent.

Q. That is a rather steep grade?

A. A rather steep grade right here (indicating). When you get right here, right at the top, it isn't over two to three percent, right here (indicating.)

Q. Which way?

A. Either way you want to go.

Q. Is it flat on top at all?

A. It just kind of crowns over.

Q. So that actually on the surface, or what they call the top, there is no point that is two or three hundred yards where the grade is level, at no point?

A. At that particular point, no. There is a grade either way; right at the top there is no particular point—

Q. So when you go over this crown you start down immediately even if it is only a two percent grade or so; is that right?

A. A person wouldn't know he was going down, no, because it isn't that steep.

Q. When you are driving a big truck at night, even at one percent grade, you know you are going down hill, don't you?

A. Sure, I know I am going down hill.

Q. Even to one who had never been over the road before and even a one percent grade would certainly be noticeable, would it not?

A. I would notice a one percent grade, someone in a truck would, but in a car I wouldn't as much, no.

Q. You certainly would notice the difference in

(Testimony of James E. Groves.)

a car between pulling on an upgrade and the release of power on a down grade, isn't that correct, even with an automobile? [78]

A. You would with an automobile, but the grade right there isn't that great.

Q. It becomes even two or three percent beyond that very quickly, doesn't it—I mean it gets down to three percent pretty much?

A. Yes, within about 200 yards from the top you go around a curve and then your grade starts down.

Q. But all the time that you are reaching that point the grade is going down, isn't it?

A. Yes.

Q. After you go over the hump? A. Yes.

Mr. Johnson: That is all.

Mr. Cole: I have no other questions.

The Court: I am a little confused on the witness' percentage of grades. You drew, did you not, at the top of the blackboard, what purports to be a straight line?

The Witness: Yes, sir.

The Court: And you have two diagonal lines. Will you specify what you consider the percentage of grade on the two diagonal lines?

The Witness: This is just more or less guessing at the grade, but I plan that for about three percent (indicating) and this for about a six per cent (indicating).

The Court: Very well. [79]

Mr. Cole: May I ask the witness one more question?

(Testimony of James E. Groves.)

The Court: Certainly.

Redirect Examination

Q. (By Mr. Cole): As you draw that there on the blackboard, you don't purport to have that accurately reflect a two percent grade?

A. No.

Q. It is just a very rough sketch to illustrate that a six percent grade is steeper than a three percent grade? A. That is right.

Q. But that doesn't purport to show or reflect accurately that lower line is a six percent grade?

A. No, because I am no engineer.

Q. Yes; it is just for illustrative purposes?

A. Yes, sir.

Mr. Cole: That is all.

Recross Examination

Q. (By Mr. Johnson): However, it does illustrate the proportionate difference in the grade, does it not, in the pitch? A. Yes.

Mr. Johnson: Thank you. That is all.

Mr. Clasby: I have one more question, if the Court would permit me.

The Court: Very well. [80]

Redirect Examination

Q. (By Mr. Clasby): Jim, you are familiar with sections of highway where the grade is known to be two percent and sections of highway where grades are known to be four percent, and sections of highway where grades are known to be six percent, are you not? A. Myself, yes.

(Testimony of James E. Groves.)

Q. So you are able to, with that knowledge, pretty well estimate what the grade is in sections of highway that you haven't been told by an engineer what the actual grade is?

A. That is right.

Mr. Clasby: That is all.

(Witness excused.)

Mr. Clasby: That is the evidence that we wished to put in out of order so they can go back to work.

The Court: Very well. When we adjourned yesterday afternoon I announced that because of the importance of this matter, I would permit counsel to present additional argument and authorities this morning in connection with the motion to dismiss, and at this time I will hear from counsel.

(Thereupon Mr. Clasby presented further argument in support of his motion to dismiss.)

Mr. Clasby: Could we adjourn until 1:30. I have arranged for one more witness that I thought we would be ready for at that time—he is an employee—at 1:30. [81]

The Court: One more witness that you wish to call, again out of order?

Mr. Clasby: Out of order, and that concludes my case, out of order.

The Court: Then, I might ask about the availability of that witness, why it is necessary to call him out of order?

Mr. Clasby: He is a mechanic at a garage. His

time is not his own. I talked to him this morning on the phone and he said he was on a job now that he anticipated he would be through with at noon and it would be more convenient to him if he could come at 1:30. I could probably get him to rearrange it until two o'clock.

The Court: As long as the arrangement is made, I am going to go along with you.

Mr. Clasby: I don't want to inconvenience the Court.

The Court: I think hereafter, however, before we take witnesses out of order there will be some showing of the reason for doing it other than the convenience of the witness.

Mr. Clasby: I realize that.

The Court: Very well, we will resume at 1:30.

Clerk of Court: Court is at recess until 1:30.

(Thereupon, at 12 noon, a recess was taken until 1:30 p.m.) [82]

Afternoon Session

(Thereupon, at 1:30, the trial of this cause was resumed.)

Clerk of Court: Court has reconvened.

The Court: Are the parties and counsel ready to proceed?

Mr. Johnson: The plaintiff is ready.

Mr. Clasby: With the Court's permission, we would like to call Mr. Hutchison.

JAMES HUTCHISON

a witness called in behalf of the defendant, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Clasby): Will you state your name, please? A. Jim Hutchison.

Q. What is your business or occupation, Mr. Hutchison?

A. Mechanic for Fairbanks Motors.

Q. How long have you been a mechanic for Fairbanks Motors?

A. Let's see—ten years.

Q. And for a considerable portion of that time have you been the shop foreman? A. Yes.

Q. Is the firm the local distributor for Dodge automobiles? A. Yes.

Q. In your work, have you had occasion to [83] service and repair Dodge automobiles?

A. Yes.

Q. Are you familiar with the transmission on the 1953 Dodge Coronet? A. Yes.

Q. For how long have you been familiar with that transmission?

A. They first came out in 1952—no, it came out in 1947, actually, that is, the M-6, the automatic transmission.

Q. You have been familiar with it since it came out? A. Yes.

Q. Do the drivers receive factory manuals on transmissions? A. Yes, they do.

Q. Are you familiar with the factory manual on it? A. Yes.

(Testimony of James Hutchison.)

Q. Do the drivers also receive bulletins from the factories advising of the idiosyncracies or difficulties, if any, relating to a part of the car from time to time? A. Yes.

Q. Are you familiar with such bulletins as have been received by Fairbanks Motors from the factory with respect to the transmission of a 1953 Dodge? A. Yes.

Q. Have you had occasion to repair such transmissions? A. Yes. [84]

Q. Frequently? A. Not frequently.

Q. But you have had occasion to? A. Yes.

Q. Are you familiar with their operation?

A. Yes.

Q. Would you explain to the Court first the type of transmission that is on the 1953 Dodge Coronet?

A. It is an M-6. It is an automatic hydraulically controlled transmission. It has four speeds: two speeds in power gear and two speeds in the high gear.

Q. In other words, it has two speeds forward and in addition a dual range?

A. That is right, it has a dual range in the high gear.

Q. And how is the mechanism activated?

A. It is manually controlled by a shift lever and also by hydraulic oil on a mechanical linkage within the transmission and electric solenoid and governors.

Q. Is there a clutch or other apparatus that is necessary in its operation?

(Testimony of James Hutchison.)

A. Outside of the regular clutch that is in the car, there is a clutch in the car to de-clutch.

Q. Assuming you were starting that automobile from a standstill. Explain to the Court the procedure you would go through into high gear. [85]

A. The first thing you do is depress the clutch pedal and pull the transmission down to the driving range with the high gear and release the clutch and you are in what they call the second speed. As you press the foot feed contact off and release the foot feed, that puts it up into a different range. That is high gear.

Q. And that is the range used for all normal operations? A. That is right.

Q. You spoke of a low range or low gear range being possible. Would you explain how to activate that in operation?

A. If you start out, say, from a dead standstill, put the transmission into, on an ordinary car, into second gear, that would be low gear, you depress the foot feed and build up to about six to eight miles per hour, then release the foot feed, and it will go into what you call the second speed. That is actually, in comparison with an ordinary car, it would be the second gear. It shifts automatically by hydraulic pressure. That would be your power gear. There are two speeds in the power gear.

Q. Would it be necessary to depress the clutch and again shift in order to get from the power gear over into the normal driving range gear?

A. Not ordinarily, but most of the people do

(Testimony of James Hutchison.)

that. You can pull it down with the high gear without shifting or depressing.

Q. Presuming the car is in operation and going down a hill and it is in the high range, would you [86] tell us how one would go about getting it into this low range, or low gear?

A. The only way you could get it down into low gear would be to fully depress the foot feed, which would kick it down below forty miles an hour. Above forty miles an hour it will not kick down, unless you move the gear shift lever into the second speed. If the car is going at a high rate of speed, that isn't possible.

Q. Let's presume you are going twenty miles an hour and you want to get it into low range.

A. You would depress the clutch pedal and it would go into second speed.

Q. It would go in if the car were going that slow? A. Yes.

Q. If you were going forty miles an hour, how would you accomplish it?

A. Actually, it would be the same operation, except you would have to double-clutch the car, because it will not go in by just depressing the clutch and trying to ram it in. That just won't do it. You have to speed your transmission up in order to mesh the gears properly.

Q. You would depress the clutch, move the gear, release the clutch, and accelerate the engine as fast as you could get it to go? A. That is right.

Q. And depress the clutch again and then shoot it in? A. Yes. [87]

(Testimony of James Hutchison.)

Q. With the disk type of clutch, a person with practice can become familiar with how to do that?

A. Yes.

Q. Does the hydraulic coupling make any difference?

A. No. That is a solid unit. After the engine builds up a certain amount of speed, it locks.

Q. Then, your testimony is further that if the speed was much greater it would be impossible. Is that founded on the fact that you couldn't accelerate the engine, turn the R.P.M. up fast enough, to permit it to go into second gear?

A. That is the idea.

Mr. Clasby: I think that is all.

Cross Examination

Q. (By Mr. Johnson): Jim, isn't it a fact that on that type of transmission you have two ways of shifting from, let us say, third to fourth? When you shift into the driving range, let us say, after depressing your clutch pedal and pushing the gear shift level up, it is in third gear automatically. But now when you want to shift it to high, you can do that one of two ways, can't you? You can either depress the gas pedal a little bit and speed it up more and more, and then take your foot off, and it will automatically shift into high?

A. If it is in the high range already. [SS]

Q. I mean in the high range. If you don't do that and keep your foot on the gas pedal and keep pressing it down, eventually it will reach a speed where it will also change into high?

(Testimony of James Hutchison.)

A. No, you have to release your foot feed in order to get it to shift.

Q. The one you sold me used to do that, I don't know—on a hill, particularly, if you would push it clear down to the floor you would get the engine speed up enough so it would change into high without doing it either way—I am talking about a gyrotorque transmission.

A. That is the transmission, exactly.

Q. The kind I had on the Dodge you sold me?

A. The only way it will upshift, if you have made a shift from—you started out into high gear, you accelerated up to 35 miles an hour, the only way it will shift is by releasing the foot feed.

Q. Doesn't it have what they call a passing speed shift in there?

A. It has. If you are in high gear and below 40 and you want to pass a car, you mash down the foot feed as far as it will go, it will automatically shift down one gear so you can pass that car. It gives you more acceleration, yes.

Q. Have you ever been over Thompson Pass?

A. Yes, many times.

Q. And you are familiar with that long hill [89] that goes down toward Valdez?

A. Yes, I am.

Q. Assume that you had a 1953 Dodge Coronet like the one I used to drive—you know that car?

A. Yes.

Q. And assume that you had reached the top of Thompson Pass, but before that, oh, say, 50 or

(Testimony of James Hutchison.)

25 or 30 miles before that you had punctured the brakeline and all of the brake fluid had escaped from the foot pedal or the brake and you had no foot brakes at all but you still had the hand brake which is a type of brake that clamps down on the drive shaft; isn't that it? A. Yes.

Q. And assume that you got to the top of Thompson Pass and not knowing exactly the type of road it was except that it was going down and you had stopped. Now, if you had that condition and knew how to drive that car, would you put it in first gear or in driving range?

Mr. Clasby: To which we object, if the Court please, it being a hypothetical question first posed on cross-examination without the purview of direct examination, and secondly not embracing all the facts within this case. It doesn't give the witness the same picture and circumstances as were known to the driver of this car in many, many respects.

The Court: I am worried about the answer to the question on both grounds urged. One is that [90] it is not within the scope of the direct examination and, second, I am wondering whether it is admissible here to state what an expert might do. Maybe it is proper, but I am not sure.

Mr. Johnson: Well, I will withdraw the question.

The Court: Very well.

Q. (By Mr. Johnson): If you were using a car of this kind on a long hill, would it be advisable, do you believe, to put it in the power range if you

(Testimony of James Hutchison.)

were starting a long descent that varied anywhere from two to four to six percent, we will say?

A. Yes. I would use the power gear, for that long hill, if you didn't want to use brakes or if you didn't have any brakes, the thing is, if you stop on this hill or use your power, you have to use the transmission upshift. It will not shift by itself.

A. That is going up? A. That is going up.

Q. But I am thinking of in going down.

A. If you stop on a hill and put the transmission in first gear, it has to shift into second gear to get the brake out of the engine.

Q. That is going up?

A. No, that is coming down, too. You can still make an upshift and still come down against the engine.

Q. But the chances of braking are much better in the power range? [91]

A. Yes, they are, but you can't get a power range in that low range, actually. If you just let the clutch out, it won't do anything except free-wheel.

Q. The clutch and transmission are separate?

A. That is right.

Mr. Johnson: That is all.

Redirect Examination

Q. (By Mr. Clasby): If I am grasping your testimony, as I understand it, let's talk about the normal driving range for a moment. When you put your car in gear and let up on the clutch and

(Testimony of James Hutchison.)

de-accelerate, start rolling, you start rolling with a high gear ratio, and if that car goes ahead and then starts down a little bit of an incline where the driver would, let us say, take his foot off the gas, and the car picked up a little bit more speed, it would hit a point where it would automatically go into a less high gear ratio?

A. It should, yes.

Q. And, if I understand it, it is an automatic transmission?

A. That is right. Like on your first gear range, you say, you start out in the low range, low gear, and you accelerate up, say, to 15 miles an hour, then release the foot gear, it will go into another gear. If you still hold on the foot gear, it will not.

Q. As long as you continue holding down on the foot feed, you have no compression on the car?

Mr. Johnson: If the Court please, this is a leading question. I think he should let the witness testify. I object, on the ground that it is leading and suggestive.

The Court: Overruled.

Mr. Clasby: Isn't that right?

The Witness: State that question again.

Q. (By Mr. Clasby): As long as you are applying power, you haven't any engine compression holding it back, and you are gradually increasing speed? A. That is right or holding——

Q. Is it correct to say that on that car, once you get it in low range when you start out and it is in low range, the only way you are going to

(Testimony of James Hutchison.)

keep that compression and keep it in low range is take your foot off the accelerator and keep the car at 15 miles an hour; the minute it gets over that it will automatically shift into the next higher range and give you more acceleration?

A. It will upshift into second speed.

Mr. Clasby: That is all. [93]

Recross Examination

Q. (By Mr. Johnson): But that second speed has still more compression and braking power than the high range, doesn't it?

A. Yes, very definitely.

Mr. Johnson: That is all.

Mr. Clasby: That is all.

(Witness excused.)

Mr. Clasby: We express our thanks to the Court for permitting this out of order.

The Court: Very well.

Now, I believe at this time it will be proper for me to rule on the defendant's motion; is that correct?

Mr. Clasby: Yes, that is correct, at the end of the plaintiff's case.

The Court: Yes. I enjoyed the argument of the defense counsel first on the proposition of the family-car doctrine, and if I were called upon to pass on that question, without pressing it, I would likely favor the strict interpretation of the law, statutory and otherwise, but in view of the former decision in this Territory and the many States of the Union

that have adopted the family-car doctrine, I think that I would be unwise to put my judgment ahead of all those authorities and attempt at this time to upset what appears to be the settled law in the Territory of Alaska, as well as in many other jurisdictions, and I will adopt what has been called the humanitarian rule. [94]

Now, I don't mean, in making my ruling, that I think there is no force or effect or weight to the defendant's argument on the question of negligence and assumption of risk, but at this time and under the state of the record I think that the plaintiff has made out a prima facie case such as would not permit me to grant the motion to dismiss. At least, at this time my thinking is that the plaintiff's intestate, in riding in the car, knowing that the brakes were defective, certainly amounted to contributory negligence or assumption of the risk insofar as the defective condition of the foot brakes was concerned, but I don't believe at this stage, that once she assumed that risk or if she was guilty of contributory negligence, that that means that from then on the driver of the motor vehicle was relieved from the duty of using reasonable care for her safety and the safety of the plaintiff's intestate. In that I may be wrong, I realize, but counsel has mentioned, I believe, the situation where the foot brakes might have burned out on the way down the mountain. Then what would have been the duty of the driver? I don't think she would have had as great a duty under those circumstances as she had under the circumstances in the instant case,

as she wasn't faced with the unexpected emergency in the illustrated case, but here she knew full well that she had no foot brakes and with that knowledge she also knew that she was going to descend a dangerous mountain road, and I think that the plaintiff's case so far has made out a prima facie [95] showing that the driver of the motor vehicle did not use reasonable care for her safety and for the safety of the plaintiff's intestate, and I therefore deny the motion.

Mr. Clasby: At this time, we submit as part of our case the testimony that has been put on out of order. In addition to that, I have one other element that I have never been able to determine whether it is a matter of evidence or a matter of law: that is the regulations governing the use of highways and vehicles in Alaska. If the Court feels this regulation should be introduced as an exhibit, I will see if I can get ahold of a booklet. I am under the impression that they are sufficiently a matter of law that the Court can take judicial knowledge of them and we may not have to introduce the booklet, but I don't want to foreclose using the law that is in that by my failure to introduce the booklet if the Court feels that is essential.

The Court: Mr. Johnson, what is your thinking on that?

Mr. Johnson: Well, while it is true that I assume the booklet he refers to is the booklet of rules and regulations published by the Highway Engineers' Office and the Territorial Highway Po-

lice, however those rules and regulations, as such, are not statute law, and whether the Court can take judicial knowledge of them as such I do not know.

I believe that these pamphlets are readily available and it would be a very simple matter to get one and put it in evidence, if that is counsel's [96] desire, and I think it would be of considerable help to the court to have it in the record.

The Court: Do you have such a copy?

Mr. Clasby: I can get one. My point was——

Mr. Johnson: I don't even know what he is talking about or what part of these rules and regulations he has in mind. Excuse me for interrupting, but it is quite a thick little booklet and there are a great many rules and regulations contained in it and he should mention what he has in mind.

The Court: I am wondering at this time what particular rule or regulation you might think would be pertinent to this case.

Mr. Clasby: If I were to discover it in a statute, I would pull down the code and say, "Here it is," but the law relating to the operation of motor vehicles is not found in our statutes. It is found in the regulations made by the Alaska Road Commission under authority of the statute. I don't want to come in an hour from now and pick up a book and start reading to the Court and say, "This is the law," and the Court saying, "I can't consider it because I can't take judicial knowledge of a regulation." I am convinced the Court can, but I did not want to argue that point as a matter of law.

The Court: I think Mr. Johnson has indicated

a willingness to stipulate to obviate any misunderstanding, if you will tell him what particular document you wish covered by the stipulation.

Mr. Clasby: I would like to have considered as [97] a part of the record the regulations of the Road Commission relating to the operation of motor vehicles and equipment on motor vehicles that were applicable in the year 1953, and the only regulation I have in mind possibly calling to the Court's attention as pertinent would be that requiring brakes and making the operation of the motor vehicle without brakes a violation of the law.

Now, to get into the question of negligence per se, I don't think that it is particularly material, but it is something that the Court would take cognizance of automatically if it were a statute, and should do the same thing with respect to the regulation which we go by, as having the same effect in law as a statute.

Mr. Johnson: May it please the Court, I am perfectly willing to stipulate that the regulations may be used by counsel in argument if he produces a copy and reads from it, so that I might do the same thing.

The Court: Very well. I think it is understood that that may be used by either counsel and by the Court.

Mr. Clasby: And by the Court. Then, on that basis we at this time rest, and of course renew our motions in the light of the additional evidence and are in a position to argue our position on the merits now that all the evidence is before the Court.

(Mr. Clasby presented additional argument on his motion to dismiss.) [98]

The Court: If something has happened here that shouldn't have, I was just wondering, it could be my fault. I am wondering if your argument and your motion wasn't premature. I don't know whether the plaintiff intends to put on any rebuttal or not. You didn't have an opportunity for rebuttal.

Mr. Johnson: I wondered about that, but counsel went ahead without giving me an opportunity.

I would like to call Mr. Aronson for just one question, as long as counsel has raised it by inference, at least, in his argument. It won't take but a minute.

The Court: Well, I think I am going to take a ten-minute recess, at which time you should consider what you wish to put in in rebuttal, and of course you will have the whole facilities of the Court for this afternoon, tomorrow, or next week, if you so wish.

Mr. Johnson: Thank you, sir.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Court: Are you gentlemen ready to proceed?

Mr. Johnson: The plaintiff is ready, your Honor. I would like to recall Mr. Aronson for a question or two, if I may.

The Court: He has been sworn. You may take the stand, Mr. Aronson.

EARL G. ARONSON

the plaintiff, resumed the stand in his own behalf [99] in rebuttal, and having been sworn previously, testified further as follows:

Direct Examination

Q. (By Mr. Johnson): Mr. Aronson, did your wife, to your knowledge, ever drive the McDonald automobile? A. No, sir.

Q. Did your wife, to your knowledge, know anything about so-called automatic transmission or a gyro-torque transmission, such as the McDonald automobile had? A. No, sir.

Q. Had she ever driven a car at all?

A. She drove my car. It had a standard shift.

Q. And that is all that she had ever driven; is that correct? A. Yes, sir.

Q. Did she know anything about the gears or the gear shift on an automobile of the type that was involved in this accident? A. No, sir.

Mr. Johnson: That is all.

Cross Examination

Q. (By Mr. Clasby): How old was she at the time of the accident? A. I think 48.

Q. For how many years had she been driving a motor vehicle?

A. Well, about fifteen years, to my knowledge.

Q. And was all of her driving experience with conventional shifts, or had she operated a Model T Ford?

A. No, the standard shift, the regular shift,

(Testimony of Earl G. Aronson.)

what they call a standard shift, is the only kind of car I ever owned.

Q. And she always drove your car?

A. Yes, sir.

Mr. Clasby: I think that is all.

Mr. Johnson: Does the Court have any questions?

The Court: No questions.

Mr. Johnson: That is all, Mr. Aronson.

(Witness excused.)

Mr. Johnson: The plaintiff rests on the question of liability.

Mr. Clasby: We have no sur-rebuttal.

The Court: Both parties having rested, I assume that the record will show that your motion is now renewed?

Mr. Clasby: Yes, my whole argument should be considered as if it were taking place now or had taken place now.

The Court: Is that satisfactory, Mr. Johnson?

Mr. Johnson: I have no objection.

The Court: Very well. Now, at this time, Mr. Johnson, I will hear from you in opposition to the defendant's motion to dismiss.

(Thereupon Mr. Johnson presented argument resisting the motion to dismiss.) [101]

(Mr. Clasby presented rebuttal argument in support of his motion.)

The Court: Gentlemen, I wish the matter were as clear to me as it is to each one of you counsel.

In my mind we have some very, very serious legal questions and factual questions upon which those legal questions may depend. I think, at least, I agree with defense counsel that if the accident were proximately caused by the defective foot brakes, then the plaintiff cannot maintain this action, because it is clear that she acquiesced in riding in the car, knowing of its dangerous condition—knowing it did not have foot brakes.

The fact that counsel has not commented on the features that are worrying me the most, or if you have commented, I didn't grasp your arguments, I want you to know that the thing that is bothering me the most—suppose I should find, and I can, from the evidence — there was some discussion among the attorneys where this car was stopped when they had the so-called prayer meeting—but suppose I should find, as testified by the young man, that from where they had the prayer meeting after the fog lifted she could see—Mrs. Dickerson said she couldn't see even when they started up, but George McDonald said he could see and he saw there was a drop from there on, that is, right where they had the prayer meeting and the discussion as to whether they should go on or not, it was steep down ahead of them, trying to decide whether to go on without foot brakes. Now, suppose [102] I should find all of that, the part that troubles me greatly is this: the plaintiff has the burden of proof in this, there is no doubt of that, but wherein in the evidence, and maybe you can point it out to me, do I find any credible evidence that

it was, in fact, negligent for the driver of the car not to shift the level into low gear. Let us assume that that would be negligence, or let us not assume it. We can't assume it. Do I take judicial notice of the fact that had it been shifted into third gear that it would have gone down this particular mountain without mishap? Am I to take judicial notice of that fact? Am I a mechanic experienced enough, or supposed to be, to know the effect of that? I don't know how many miles it had on it, how much compression it had, I don't know how much it would have held it back had it been in second or third gear. I don't know a thing about it.

I suppose plaintiff is going to say, "We have the deposition of the boy and he gives an opinion" which he may or may not have been qualified to give, but he said in answer to this question I read from page 128:

"Q. Mr. Pipkin asked you based on your experience how in driving and your remembrance and recollection of what happened on that occasion, had she started down this hill in first gear and the hand brake set she probably could have made it?

"A. She would have made it I am pretty sure because I have driven several cars with the same transmission setup and everything."

And then he goes on to tell some of his experiences in stopping the car, but is that the type of evidence that I am to say is sufficient to sustain the burden of proof. That is the part that is bothering me.

In other words, where in the evidence do I find

this man, this boy who testified, doesn't show any familiarity with the particular highway in question, what would have been the result had the driver of the car put the transmission into a lower gear? I don't know. Am I to speculate against the defendant and find that the accident would not have happened or must I base such a finding on testimony and, if I must base my finding upon testimony, where is the testimony that this accident would not have happened had the driver of the car done something that the plaintiff claims she should have done and didn't do? Where is the evidence on that point?

That is where I am bothered. As I say, am I to take judicial notice of what would have happened to that particular car had it been shifted into a lower gear?

Mr. Johnson, I suppose that I am addressing that query to you, because that really has me bothered.

Mr. Johnson: Well, that presupposes just one thing. Either I ask leave to reopen the case and [104] try to produce some such testimony or else I get kicked out of Court, and I certainly don't want the latter to happen and therefore I now move to reopen the case for the purpose of trying to supply some expert testimony, if it is available, that will answer the Court's question.

The Court: Mr. Clasby, you heard the motion of the plaintiff's attorney?

Mr. Clasby: I hate to see anyone deprived of fully producing the evidence they wish and I am sure the Court probably feels the same way, but

the thought occurs to me: how are we going to saddle this woman, who had never been over the road before and who was up there in the dark and in the clouds, with all the knowledge of experts that might be produced by the plaintiff? How was she to know? How was she to know how far ahead there was a grade? So if we permit this testimony to come in, we are buying that kind of a problem, too, and I think we may cloud our thinking by permitting such testimony to come in. We can't impose on her any greater duty than a common prudent person under the same or similar circumstances. We can't impose on her the duty that a truck driver would have that had been over the pass hundreds of times and knew that there was a four-mile hill ahead and ten percent grade ahead and knew that gearing down was essential.

That was the thought I had on it. Other than that I would be the last one in town to resist any [105] attempt by the plaintiff to fully prove his case.

The Court: I am going to grant the motion of the plaintiff to reopen for the purpose of submitting further proof and I am not now ruling, but I think the plaintiff ought to look also into whether or not I can receive evidence on custom in mountain driving in this locality of the accident, and I am aware of the fear expressed by Mr. Clasby, and that is something that I can only take care of in my rulings as we progress, when objections are made, but I wish to give the plaintiff an opportunity to prove its case.

Mr. Johnson, it is now 3:20 in the afternoon. Do you think you could be ready to proceed at ten o'clock tomorrow morning?

Mr. Johnson: I will certainly try to, sir.

The Court: That doesn't give you much time, I realize. I assume, Mr. Clasby, that unless something new is opened up that you don't have any witnesses from far away places that are here in town awaiting this trial. I am wondering if I could allow Mr. Johnson until two o'clock tomorrow afternoon.

Mr. Clasby: I submit to the Court that the only rebuttal testimony that I could at the moment conceive would be pertinent to the testimony that Mr. Johnson is presumably about to introduce would be the testimony of someone who went down that pass on the Valdez side in low gear and did not make it. I can see no other testimony that I could [106] possibly search for that would be pertinent to the issue before the Court that is apt to be raised, so I can't visualize any sur-rebuttal.

The Court: If later you should visualize some and should find you need time to produce it, I will listen to you.

Mr. Clasby: Is the case continued, then, until two o'clock tomorrow?

The Court: Unless you have some particular objection to the two o'clock continuance, I think that would give Mr. Johnson a better opportunity to look into the matter.

Mr. Johnson: Thank you, your Honor.

The Court: Very well, this case, then, is continued until two o'clock tomorrow afternoon.

(Thereupon, at 3:25 p.m., October 10, 1956, the trial of this cause was adjourned, to resume on October 11, 1956.) [107]

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., October 11, 1956, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

The Court: Counsel, at this time I call your attention to the fact that the official court reporter for the Fourth Division has been required to give testimony in Commissioner's Court and is therefore unavailable for reporting this case this morning, and I am wondering whether there is any objection to the official reporter from the Second Division taking this position of reporting?

Mr. Clasby: We have no objection.

Mr. Johnson: We have none.

The Court: Very well. I understand at this time the plaintiff wishes to offer further testimony in its case in chief? Is that correct?

Mr. Johnson: That is correct with this understanding. We asked the indulgence of the Court to put Mrs. Dickerson on the stand at 10:00 a.m. this morning in order to permit her to return to her home, but we have two other witnesses which we would like to produce at 2:00 p.m. this afternoon.

The Court: Mrs. Dickerson, will you please take the stand?

MRS. JOHN T. DICKERSON

took the stand and having previously been sworn, testified as follows: [108]

Direct Examination

Q. (By Mr. Johnson): You are Mrs. John Dickerson, is that correct? A. Yes, sir.

Q. You previously testified in this case?

A. Yes, sir.

Q. At that time you were placed under oath?

A. Yes, sir.

Q. Now you were a passenger in the automobile that was involved in this accident?

A. Yes, sir.

Q. Mrs. Dickerson, I believe it was your previous testimony that you had never been over, or anyone in the car had never been over this particular highway prior to this time. Is that correct?

A. That is correct.

Q. Now, will you describe to the Court the appearance of the country and terrain as you were approaching the point at which you stopped for a prayer meeting. I believe your previous testimony indicates that you did stop and have a short prayer. Is that correct?

A. That is correct, yes; a few minutes before we started down the summit.

Q. Now, will you describe for the Court what you saw as you were approaching this incline. [109]

A. Well, as I said previously, it was a foggy night and we knew that we were going up an incline and we realized after quite a trip, it seemed

(Testimony of Mrs. John T. Dickerson.)

several miles, that we were—well, we had the feeling that we were on top of the world. We could see down below; on the left you could see a chasm or cut side of the mountain, but from our position in the back seat I couldn't see up the road. Of course it was still up a little way and I couldn't see very much for the fog. You could tell we hadn't quite reached the top of the summit. Now speaking from my own visibility, below us you could penetrate the fog with the naked eye but up the road I couldn't see very much. And as we ascended we noticed this mountain which we could see in the distance before we got to this particular mountain on which Thompson's Pass is located.

Q. How did it look as you were approaching it?

A. It didn't look too high. We saw what we thought was a cloud on the top. We didn't know the cloud—the road went up through it. It looked like the top of the mountain with a cloud on top of it but we didn't know the road we were on or that particular mountain either.

Q. However, when you stopped for this prayer, you were on the top of the mountain, or near it?

A. Yes. We had already ascended this mountain which we had seen in the distance. [110]

Q. Now after you held the prayer meeting and you started to proceed toward Valdez, which would be down the mountain—

Mr. Clasby: I object to counsel putting words in the witness' mouth. It has already been testified

(Testimony of Mrs. John T. Dickerson.)

previously several times that they proceeded up after stopping for prayer.

The Court: Yes. I think I will sustain the objection as perhaps confusing the witness.

Q. (By Mr. Johnson): After you started and after the prayer meeting and you commenced to go forward what, if anything, did you hear Mrs. McDonald say during the time that intervened between the time when you started and when you ran off the road?

A. Well, it was her own testimony that she could see after we had stopped there. She said she could see the road and see well enough to drive, and she started off in drive gear. I remember that she had driven in that gear for awhile and in a few minutes we could tell the car started to decline. Of course shortly after we started down, I smelled this burning and I asked her if the car were on fire and she said no, she didn't think so, "it's our hand-brake, I believe." And after a few seconds she convinced us the hand-brake had burned out. I was panicky I must admit and I suggested to her that we jump out of the car and she said "no." She said "you sit down and relax. When I get in this gear we will be all right." But I didn't relax. I guess she thought I would do as she told [111] me, apparently. She only told me that once.

Q. And Mrs. Aronson was in the back seat with you?

A. Yes. I judge she was very much afraid, for she caught my arm, my hand and tried to settle

(Testimony of Mrs. John T. Dickerson.)

me. I could feel her tenseness. She was awfully tense, as I was, and she tried to relax with me in the seat.

Q. And shortly afterwards the accident happened?

A. Well, we continued to descend and I became panicky enough to roll down the window for fresh air. So I made the statement—in ministerial terms I suppose you would say—that “we were all going out into eternity.” I said “I am afraid we are all going out into eternity.” Mrs. McDonald said “I don’t think so” and continued on and shortly after that she said she couldn’t get the car into gear and she cut off the switch. We had ample time to discuss a lot of things because it is a matter of three and a half miles down the hill. But after she cut off the switch and said she would free-wheel down the hill we didn’t say—I don’t remember saying anything else.

Q. And the accident happened shortly after that?

A. That’s right. Shortly after that we went over on the side.

Mr. Johnson: That is all. You may cross examine. [112]

Cross Examination

Q. (By Mr. Clasby): You didn’t recall, Mrs. Dickerson, making a statement—do you recall making a statement concerning how this accident happened? A. Yes, sir. To you.

(Testimony of Mrs. John T. Dickerson.)

Q. Would you recognize that statement if it were shown to you? A. I think I would.

(A document is handed to the witness.)

A. I haven't read it here in its entirety but I am sure it is.

Q. Do you remember signing it? A. Yes.

Q. Did you read it at the time you signed it?

A. Well, I gave a statement to Mr. Martin and to Mr. Johnson—is this the statement I gave to Mr. Martin?

Q. To Mr. Martin. And did you read it at that time before you signed it?

A. He read it to me I believe. I don't remember reading the statement. I remember he took it in the living room but I don't remember reading the statement.

Q. Now directing your attention to when you stopped at Mile Post 57 and you talked to the garage—to the man there is this a correct statement of what then occurred, "We knew from what the boy said that the worst highway was behind. Someone had told us that we would go through some [113] canyons, I believe Keystone, which had been described as the most beautiful scenery. No one mentioned any mountains or the possibility of them. The fellow at Mile 57 said the nearest garage was at Valdez"? A. Yes.

Q. He did tell you that? I say, is this a correct statement?

A. I have learned since that it was not.

Q. I mean at that time.

(Testimony of Mrs. John T. Dickerson.)

A. Oh. Yes, sir. At that time none of us knew a mountain was ahead—a mountain pass was ahead.

Q. None of you knew a mountain pass was ahead? A. No. We didn't know.

Q. And is this a correct statement, "I don't believe we stopped over seven or eight minutes and then went on"?

A. That is true. Mrs. Aronson——

Q. Would you wait just a minute. I will read a statement back to you and then ask you whether you remember it. "I don't believe we stopped over seven or eight minutes at Mile 57 and then went on. We went what I would judge fifteen miles when we got into the mountains. Right after we left there it began to get foggy. We drove about forty-five minutes at fifteen to twenty miles per hour, twenty at the very most. It was hazy-foggy. It looked like the moon was shining through a thick fog. We had our lights on and we could see what looked like an incline and what looked like fog. We learned later that this was clouds [114] around the peak. We continued to drive slowly and did not stop until we got to Thompson Pass, when we stopped on that high mountain"? Is that correct?

A. Where we stopped for prayer meeting?

Q. No. This whole thing I just read to you—is that correct?

A. Well, it is with the exception of where we stopped there.

(Testimony of Mrs. John T. Dickerson.)

Q. Well, I will come to that in a moment. But on that statement, is that correct?

A. Yes, the statement is correct.

Q. Then is, "We stopped at the top of a mountain, possibly a mile before we got to the top of the hill we crashed. The atmosphere was thick with fog. Mrs. McDonald seemed completely exhausted. We all talked about what we should do. We discussed maybe staying there until the fog lifted. You could just see a bare outline of the road. You couldn't tell what was on either side because of the fog. I suggested that we pray for guidance and we each said a short audible prayer." Is that a correct statement?

A. I have found out since——

Q. I mean as of that time, not what you found out subsequently. But is that a correct statement?

A. It was not a mile from the top but at the time I gave that statement I felt that it was a mile from the top of the mountain. [115]

Q. Then that statement is correct? That I have just given you?

A. Yes. I should have said I couldn't tell what was ahead for the fog. I said "you" couldn't but "I" couldn't.

Q. Now is this statement correct, "We sat there maybe five minutes longer and decided to go on. Day was beginning to break and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to us that anything serious might happen. No one expressed any con-

(Testimony of Mrs. John T. Dickerson.)

cern but there seemed to be an atmosphere of uneasiness”?

A. That is a correct statement. Mrs. McDonald suggested going on.

Q. Just answer my question if you would, please. Is that a correct statement?

A. Well, we didn't suggest going on. Mrs. McDonald said she could see and would go on.

Q. Now that might be true, but would you answer first my question. Is what I have just read to you a correct statement, please?

A. At that time?

Q. No, no. I am not trying to jibe what I said with the statement you have in your hand, Mrs. Dickerson, but I will read it off again and I will ask you whether these are actual facts as you recall them, “We sat there maybe five minutes longer and decided to go on. Day was beginning to break [116] and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to any of us that anything serious might happen. No one expressed any concern but there seemed to be an atmosphere of uneasiness.” Is that correct?

Mr. Johnson: Just a moment, if the Court please. It hasn't been stated by counsel that he is reading from a statement or copy of a statement that Mrs. Dickerson was previously questioned about, and which she has in her hand. I am not sure this is the same statement at all and I think

(Testimony of Mrs. John T. Dickerson.)

that should be determined before we proceed any further.

The Court: I think that is true.

Mr. Clasby: I must ask the question first—is such and such a fact—and if she says it is, what difference does it make? If it is correct in the statement—if she says something is correct—then so is the statement; and if there is something there on which I have a question, which I am not sure is a fact, then I want to inquire. But I must first lay the foundation.

Mr. Johnson: What I am getting at is that he is reading from something, from some paper in his hand. I don't know what that is; whether or not it is a copy of the statement she has in her hands?

The Court: Well, I think the witness has a right to either look at the statement in her hands and follow the questions, or counsel should make it clear that he is reading from a copy of the statement—if she made the statement. [117]

Mr. Clasby: Now if the Court please, I am not at this moment trying to impeach the witness with the statement. At this moment I am trying to find out what the facts are as to her present recollection.

The Court: Well, you have a right to——

Mr. Johnson: We object on the grounds that it is immaterial.

Mr. Clasby: Sometimes you ask a witness is black, black? And the witness says, no, black is white. Then you ask the witness, did you not at a certain time make a statement that black was black,

(Testimony of Mrs. John T. Dickerson.)

and if the witness says no, then you would show the statement.

The Court: You may proceed by asking another question.

Mr. Clasby: I will ask the same question over again.

Q. (By Mr. Clasby): Now then, is this not a correct factual situation, or your testimony as to what the facts actually are, "We sat there maybe five minutes," referring to what you stopped for prayer meeting, "longer, and decided to go on. Day was beginning to break and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to any of us that anything serious might happen. No one expressed any concern but there seemed to be an atmosphere of uneasiness." Now if that is correct, say so; if it is not, please explain wherein it is incorrect. [118]

Mr. Johnson: I object on the grounds again that it is something read from any statement she may never have seen before, or which she is ever purported to have made or signed, or may never have sworn to. We don't believe the proper foundation has been laid to ask the question.

Mr. Clasby: I don't believe we should require the witness to testify from the statement but I certainly have no objection to her testifying from the statement. I think in fairness—if it is the same as in the statement, then, fine; if it isn't then the variance can be gone into.

The Court: I see counsel's objection. You might

(Testimony of Mrs. John T. Dickerson.)

go on forever, not confining yourself to something contained in the statement and I don't think anything would be gained by that type of examination.

Mr. Clasby: Well, he has reopened this entire field by this examination of her. I am now cross examining this witness. I can ask her anything that is germane to what he has now reopened by his use of this witness, and I am not going a bit farther.

Mr. Johnson: Maybe I don't understand.

The Court: I will let you repeat it.

Q. (By Mr. Clasby): Let's take it sentence by sentence then. I say to you is it not a fact that "We sat there maybe five minutes longer and decided to go on." [119]

Mr. Johnson: I still object, your Honor, on the grounds that there is nothing showing that he is reading from any statement made by this witness or signed by this witness. If he is reading from some investigator's report, then that is not a proper foundation; no proper foundation has been laid. It would be very simple to say "I am reading from a copy of a statement which the witness has in her hands."

The Court: I am going to sustain the objection as counsel is evidently reading the questions from something. You may ask her any questions you wish pertaining to the facts.

Q. (By Mr. Clasby): I will adopt counsel's theory. Would you refer to the statement in front

(Testimony of Mrs. John T. Dickerson.)

of you. I will try and help you find the page, Mrs. Dickerson.

A. I believe I have it.

Q. You do have it? Then I will ask you this, which I understand appears in that statement. I will ask you, is not the following a part of that statement and is not the following also correct facts, "We sat there maybe five minutes longer and decided to go on. Day was beginning to break and it seemed a bit clearer. No one raised any objection to continuing on. I don't believe it occurred to any of us that anything serious might happen. No one expressed any concern but there seemed to be an atmosphere of uneasiness"?

A. Is this correct or not? [120]

Q. There are two questions: does it appear in the statement you have in front of you, and—

A. It appears in the statement I have here.

Q. And is it a correct statement of fact?

A. If I gave this testimony—

Q. I am not asking you that, Mrs. Dickerson. Please follow my thinking. Is that a correct statement of fact; if it is not, then you may say in what respect it is not correct.

A. Well, it is not correct in that—

Q. All right, please explain.

A. When I gave this testimony, I gave it—

Q. I don't care about when you gave the testimony; I want you to tell me now from your present recollection wherein this statement, the facts I have just read to you, is incorrect.

(Testimony of Mrs. John T. Dickerson.)

A. May I say at this time that I gave the testimony, I gave it as an incorporated body of travelers. I would like to designate who said what, in that we——

Q. That your counsel could take care of on re-direct if he chooses. The statement I just read to you, wherein is it incorrect?

A. No one consented to going on. No one raised any special objection or consent; we didn't consent to go on.

Q. Let's go on, Mrs. Dickerson. Directing your attention to the statement in front of you. Do you find this in that statement, "We drove on for maybe [121] a few minutes, possibly a mile, and seemed to be going higher. Then we started down the mountain. Something was said about speed and she was going twenty miles per hour. She said that was her speed then. I don't remember how it was brought about or anything. I think it was in connection with having another hour to reach Valdez at that speed." Is that in the statement?

A. Yes, sir.

Q. Is that a correct statement of fact?

A. That was a correct statement.

Q. Now going on. Is this in the statement, "As she started down, as she had been doing when going down grade, she pulled the emergency about half-way out to check her speed. Then we smelled a burning odor and she pulled it a little more noticing the speed was gaining, and it didn't slow us down

(Testimony of Mrs. John T. Dickerson.)

so she pulled it all the way on.” Is that in the statement? A. Yes, it is in there.

Q. Is that a correct statement of fact?

A. As we traveled, as we started down, yes, she did that—after we had gone over the peak.

Q. Then this is a correct statement of fact?

A. Yes, it is correct.

Q. Does this appear in the statement, “We smelled the odor more pronounced. She released the emergency and pulled it on again quickly but it didn’t retard our speed.” Is that in the statement?

A. Yes, sir.

Q. Is that a correct statement of fact?

A. Yes, sir. She worked on this emergency brake down the hill.

Q. Is this in the statement, “We were going quite fast. I would estimate we were going about forty-five miles per hour by then. She tried to put it in another gear. When we started down the hill we were in drive gear.” Is that in the statement?

A. When we came over the top and started down she was in drive. Yes, it is a correct statement of fact.

Q. Is that in the statement?

A. Yes, it is a correct statement of fact. Well, when we came over the top she was in drive gear and when we first started down, yes.

Q. Well is the rest of it correct, “We were going quite fact. I would estimate we were going about 45 miles per hour by then. She tried to put it in another gear.” Is that also correct?

(Testimony of Mrs. John T. Dickerson.)

A. Yes, it is correct. She got into neutral—from drive gear into neutral.

Q. Now is this in the statement, "When she tried to shift into low or whatever other gear those automatics have, it just growled and scraped. It would not go in." Is that in the statement? [123]

A. Yes, sir.

Q. Is that a correct statement of fact?

A. Yes, it is correct statement of fact, with the insertion that we were in neutral at the time.

Q. Please don't insert anything. I merely want to know if it is correct or incorrect. If it is incorrect I want you to tell me but I don't want you to volunteer anything further. Now going on, is this in the statement, "She said maybe I can get it in reverse. She seemed quite calm, not unduly excited. She kept working the gear lever and kept working on the hand brake all the time, and keeping the car on the road. We were going around some curves, and downhill too." Is that in the statement? A. Yes, it is in the statement.

Q. Is that a correct statement of fact?

A. Yes. It is not a straight road down the mountainside.

Q. Now is that in the statement, "She kept control of the car until we gathered high speed and she said she would switch the motor off when I said it smelled like the car was burning." Is that in the statement?

A. Yes, it is in the statement.

Q. Is that a correct statement of fact?

(Testimony of Mrs. John T. Dickerson.)

A. When I told her the car smelled as if it were burning it was farther up the road. That odor continued—was in the car all the way down.

Q. Is this in the statement, "She said she didn't think the car was burning. I suggested maybe we could jump out and Mrs. Hall and Mrs. Aronson said not to get excited." Is that in the statement?

A. Yes.

Q. Is that a correct statement of fact?

A. Mrs. McDonald told me not to get excited too, and that was the one I remembered because she told us if she got it in gear we would be all right.

Q. Do you not recall Mrs. Aronson telling you the same thing?

A. Earlier in that ride down when she was claspng my arm she could have told me not to get excited.

Q. And your memory at the time you made that statement may have been a little clearer than now.

A. On this particular—on this it could, yes.

Q. Now is this in the statement, "The car continued to gain headway. We were coming out of the fog. I rolled my window down for air. We left the road." Is that in the statement?

A. Yes, sir.

Q. Is that a correct statement of fact?

A. Yes, sir, that is true.

Mr. Clasby: No other questions. [125]

(Testimony of Mrs. John T. Dickerson.)

Redirect Examination

Q. (By Mr. Johnson): In some portions of the statement that counsel has been questioning you about, you used the pronoun "we." Will you explain that a little bit more fully.

A. Well, when I gave this statement to Mr. Martin, I gave——

Q. Incidentally, is Mr. Martin an investigator?

Mr. Clasby: I object, as to its being irrelevant and immaterial who Mr. Martin is.

The Court: Objection sustained.

Q. (By Mr. Johnson): Where did you give this statement by the way?

A. In the living room, shortly after the accident occurred; very soon afterward I returned from Valdez, which was Friday after the accident.

Q. Were you still incapacitated after the accident? A. Yes. I was still in bed.

Q. In whose handwriting was that statement?

A. It was not in mine. It seems to have been in the insurance adjuster's, Mr. Martin's.

Mr. Clasby: I ask that the answer be stricken and I am almost in mind to move for a mistrial. Mrs. Dickerson must not volunteer any statements. She can get everybody in hot water. Does the Court [126] feel he can disregard that statement completely.

The Court: I am sure I can disregard the last part of it. I can't expect Mrs. Dickerson to know the technical workings of the law but I will disregard the entire last part of the statement.

(Testimony of Mrs. John T. Dickerson.)

Q. (By Mr. Johnson): Now, just confining yourself strictly to the statement, did you read the statement after it was prepared and before you signed it? Do you recall?

A. No, this is my first recollection of reading this statement. I believe that it was read to me.

Q. Do you have no recollection of reading it yourself? A. No—no.

Q. Now, when you used the pronoun “we” with reference to a statement concerning what “we” did, will you explain that a little more fully.

A. Yes, I can. I just took it as a traveling party and I didn’t designate who said what. I just said “we” because we were traveling together, at the time I gave the statement.

Q. Now, have you a vivid recollection of everything that happened on that accident on the mountainside?

A. Yes, I have, and I have no contradiction with what I said but I could clarify, I believe, which one of us did what in that “we.”

Q. Well, that is what I want you to do.

A. We stopped there; I asked to stop as we [127] went up the hill. We had the prayer meeting and Mrs. McDonald suggested going on; that she could see. We didn’t consent to go on but, as I said, we didn’t object. The objection, to me, had been made much earlier and we were afraid—

Mr. Clasby: If the Court please, in the first place this is cumulative and in the second place it is dangerous to turn the witness loose on such an

(Testimony of Mrs. John T. Dickerson.)

extremely broad question, and without knowing what is coming afterward it can cause many difficulties. I think she should be confined to specific questions.

The Court: I believe that is true, Mr. Clasby, and possibly that Mr. Johnson, if he wishes to pursue it further, should have the statement that was shown to the witness.

Mr. Clasby: I am very happy to let him have it.

Mr. Johnson: The widest latitude was granted counsel when he was having two men describe Thompson Pass. I see no reason why we shouldn't be allowed a little latitude.

The Court: Well, I am not trying to limit your latitude unnecessarily, but when she is asked to explain who she meant by "we" in the statement—perhaps she has used "we" many times. I don't know which "we" you are referring to. I don't think the witness could probably know. It is a very general question and too general to permit, I think, an answer.

Q. (By Mr. Johnson): Now, Mrs. Dickerson, calling your attention to the bottom paragraph on that particular page—the page isn't numbered—[128] but it is that portion of the statement relating to stopping at the mountain top and about which counsel has questioned you, and you used the pronoun "we" in one or two places. Will you explain to the Court what you had in mind or who you meant by "we," just what you meant if you can recall.

(Testimony of Mrs. John T. Dickerson.)

Mr. Clasby: If the Court please, we object to that. If counsel wants to read a sentence from the statement so I have some knowledge of what he is asking the witness—

The Court: Well, I am afraid the record would never reflect what page he is looking at. I am now thinking of a little theory I have had for some time. I have found no support from members of the bar in my theory but I have always felt that when a witness is shown a document and asked questions about it, that it be identified at that time. Now this illustrates why. Had Mr. Clasby had it identified—if he had had it identified, then Mr. Johnson could very easily, without asking a lot of questions, ask is this the same statement Mr. Clasby showed the witness. Now we must go into all that again. If it were identified you could merely refer to the identification and page and you could read from it and we would have a good record, but that hasn't been done.

Mr. Johnson: With permission of the Court, I would like to have it marked for identification.

Mr. Clasby: I have no objection to marking it for identification. It has always been my understanding that you don't have [129] it identified or use it as an impeaching document unless the foundation has been laid for impeachment. I don't see—I am doubtful if this is relevant even unless he proceeds to—

The Court: I am not sure of that but I just say that it seems to me to be better practice, and I am

(Testimony of Mrs. John T. Dickerson.)

not sure of my ground, that whenever something is shown a witness that it be identified. Maybe that is wrong but it seems to me that way we have a good record. In other words if a witness is shown something and counsel takes it back to his files, we have no way of knowing, without a great many questions, whether it is the same instrument as was previously shown to the witness or not, whether it's the definite instrument. But without deciding for all further time, at least at this time the paper will be identified.

Clerk of Court: Will this be plaintiff's or defendant's identification.

Mr. Johnson: Plaintiff's—

Clerk of Court: This will take plaintiff's identification No. 4.

Mr. Clasby: Now that he has the document to refer to, I believe he should read the sentences from it—

The Court: Yes, unless counsel stipulate—I suppose the witness can tell us whether or not that is the same document that was shown to her by Mr. Clasby.

Mr. Clasby: I think the witness can testify to that.

The Court: Yes, I say that maybe he will have to question her about that. [130]

Q. (By Mr. Johnson): Mrs. Dickerson, I will show you plaintiff's identification No. 4 and will ask you if that is the document from which you test-

(Testimony of Mrs. John T. Dickerson.)

ified previously when Mr. Clasby was questioning you? A. Yes, sir.

Q. And that is the same one, is it, and contains your signature? A. Yes, sir.

Q. But it is not in your handwriting?

A. No, sir.

Q. Now looking at the fourth page from the back, will you look at the bottom paragraph, and is that the paragraph that you talked about previously?

A. Yes, sir, "We stopped at the top of a mountain."

Q. Now I will read from this paragraph—page 10 of plaintiff's identification No. 4—this statement appears, "We stopped at the top of a mountain, possibly a mile before we got to the top of the hill we crashed on. The atmosphere was thick with fog. Mrs. McDonald seemed completely exhausted. We all talked about what we should do. We discussed maybe staying there until the fog lifted. You could just see a bare outline of the road. You couldn't tell what was on either side because of the fog. I suggested that we pray for guidance and we each said a short audible prayer." Now you have used the pronoun "we." For instance you say "We all talked about what we should do." Can [131] you explain that a little more fully.

A. Well, we didn't all make each suggestion. I could identify the person making the statement, but when I gave the statement, "we" included the whole traveling party.

(Testimony of Mrs. John T. Dickerson.)

Q. And will you explain exactly who made what statements?

A. Yes. I asked to stop and wait until the fog lifted and we did stop at that place for a few moments and had prayer, and Mrs. McDonald said she could see. She felt the fog had lifted and we could go on. We didn't object but we didn't consent.

Q. But there was nothing other than the statement made about it by you and Mrs. McDonald.

A. No, sir. Only that statement made about going on.

Q. Do you recall now any other statement which may have been made by Mrs. McDonald, other than those you have related as you went down the hill.

A. I have related the conversation about the emergency brake burning, how it smelled and about how she consoled me with the fact that when she got it in gear we would be all right to go down the hill, and then about turning off the switch key, and about not facing eternity—which is the way I put it that night. Those are the bits of conversation that I recall were made.

Mr. Johnson: That is all.

Recross Examination

Q. (By Mr. Clasby): Now, Mrs. Dickerson, I am confused again. A moment ago when I was examining you I understood this statement to be facts according to what you told me, "We all talked about what we should do." Now, as I understand your

(Testimony of Mrs. John T. Dickerson.)

testimony in redirect by Mr. Johnson, all that was said was that you asked that the car be stopped and Mrs. McDonald said, I think I will go on?

A. No. We stopped—I asked to stop. We all had prayer. Each one prayed audibly.

Q. Now, let's come back. And please pay attention to what I read you before, Mrs. Dickerson, to this statement that you told me was correct, "We all talked about what we should do?"

A. Well, I remember our prayers about it, but I asked to stop and we prayed about the trip, each one audibly and then she suggested the fog had lifted and she could see and we could go on.

Q. Then this statement is incorrect—you didn't all talk about what you should do?

A. I am trying to recall.

Q. Did young Bobby enter into the discussion of what you should do? Whether you should stay and wait awhile more or go ahead, the condition of the fog or the road? Did he enter into the discussion?

A. I don't recall any other conversation concerning that but my request to stop, our prayer—I suggested that we pray for guidance on the trip—we all prayed, each one audibly, and then [133] the decision of Mrs. McDonald, saying she could see and we would continue on. As I said before, when I gave that statement "we" I didn't try to identify each person who said what.

Q. Now, Mrs. Dickerson, is this your present sworn statement, that there was no discussion

(Testimony of Mrs. John T. Dickerson.)

amongst the people in that car at the time that it was stopped as to what should be done?

A. Well, I am interested in telling the truth, but I don't recall——

Q. Then answer me—is that your testimony, that there was no such discussion?

A. As to what should be done—there was nothing to discuss at that point.

Q. That is begging the question, Mrs. Dickerson. I want you to answer my question, if you please. Is it not now your sworn testimony that there was no discussion among the members of the party at the time you stopped on the mountain as to what should be done?

Q. Concerning what should be done, whether to go on,—the brake to be fixed—does that enter into the discussion?

A. We didn't discuss whether we should go on after stopping and talking with the man——

Q. No, whether the people in that party at the time they were stopped on the mountain had a conversation between themselves relating to what they should do.

Mr. Johnson: I object on the grounds that he is arguing [134] with the witness. It seems to me the question has been answered before several times.

The Court: Well I think, Mrs. Dickerson, if you will just be calm and listen to the question and answer it to the best of your ability, and if you don't understand the question, say so.

Mrs. Dickerson: I don't quite understand if my

(Testimony of Mrs. John T. Dickerson.)

explanation of saying "we" all the way through that is correct or not.

Q. (By Mr. Clasby): Let's approach it this way, Mrs. Dickerson. You did tell Mr. Martin "We all talked about what we should do," did you not?

A. Apparently, from my testimony. I recall that we——

Q. And that was just a few days after the accident occurred? A. Yes, very shortly afterward.

Q. And your memory at that time was fresher, was it not? A. Well, I was——

Q. Now, just answer my question, if you would, please, and then you can——

Mr. Johnson: I think she has a right to explain an answer of that kind.

The Court: At the same time I think we would get along better if Mrs. Dickerson confined her answers just to the question. Mrs. Dickerson, answer it as honestly as you can and if you don't understand, just say that, and please try to answer yes or no. [135]

A. Yes, my memory was relatively fresh at that time.

Q. (By Mr. Clasby): And is it probable that your memory at that time was better than your memory today, and fresher?

A. Yes. It is probable that my memory was fresher then but I was giving—I was not identifying the ones making the conversation.

Q. Then is it more apt to be correct that your statement then "We all talked about what we should

(Testimony of Mrs. John T. Dickerson.)

do," is more apt to be correct than your testimony now that the only things that occurred were that you asked that the car be stopped and Mrs. McDonald later said, "I think we can go on, and that is all of the discussion that took place relating to what we should do?"

A. Well, I have difficulty remembering now—I was think about all the absolute details, whether anyone else said anything, but the primary remarks that were made were those two and our prayers.

Q. Now, I am trying to ask you—I don't intend to ask you what any person may have said—all I want to do is determine whether or not you people did, as a group among yourselves, discuss what to do at the top of the mountain.

A. Relative to staying there?

Q. What the discussion was concerning or what my question was concerning.

A. It didn't involve the brake fixing or anything, just [136] stopping there.

Q. The discussion would be as to whether to proceed or not. A. At that moment, yes.

Q. Then there was such a discussion?

A. As I said—I will take for granted that my memory was fresher at the time of that testimony than it is now about who said what—but I clearly remember those two remarks that were made.

Q. But there could have been other remarks made you now have no memory of, relating to going forward.

(Testimony of Mrs. John T. Dickerson.)

A. Not convincing remarks or important things that were said.

Q. Well, if you can't recall what was said how can you recall whether it was important or not.

A. Each time anything was brought up, the one who made the conclusive statement was the thing we did, as in this instance I requested to stop and she stopped, although I don't recall now whether anyone else discussed it. But I remember the convincing thing that was said. I requested to stop and we did stop.

Q. I am having a bit of trouble again following you. What I am trying to get at fundamentally is, is it your testimony that you cannot recall now things that people may have said and the reason is that they are not important? [137]

A. That is true, or at least the suggestion that was obeyed. What I am trying to say is that I remember well who made the suggestion that we went by.

Q. There may have been other suggestions made that you now have no memory of.

A. Well, there could have been some suggestions that I have no memory of, yes.

Q. Between Mile 57 and the place where you stopped at the top of this summit, did it at any time occur to you that Mrs. McDonald in operating the car should do something different than what she was then doing?

A. From the time we stopped and asked the garage man to the top of the summit?

(Testimony of Mrs. John T. Dickerson.)

Q. Yes. A. Not being familiar——

Q. I am not asking you that. Please listen closely to my question again, Mrs. Dickerson. Did it occur to you as a passenger riding in that car at any time from 57 mile to the place where you stopped at the top of the summit, that the driver should be doing something different in the operation of the car than the driver was doing? A. Yes.

Q. Did you say so to the other passengers or to Mrs. McDonald that which occurred to you?

A. No, not to direct her driving. [138]

Q. That is all I want to know. You didn't say it.

Q. (By Mr. Johnson): You didn't have any difficulty until you started down Thompson's pass anyway, did you? A. No—but——

Mr. Clasby: Please don't volunteer statements.

Mr. Johnson: That is right. Mrs. Dickerson, just take it easy don't let counsel get you rattled. That is what he is trying to do. Now with reference to this conversation that you had at the time you stopped at the top of the hill—counsel has attempted to confuse you with respect to your memory of that conversation—I believe, however, your testimony is that you remember the statements that were made that were followed? Is that correct?

Mr. Clasby: I move that that question be stricken. Counsel himself was testifying. He was not asking any questions of the witness—and this is sur—direct or whatever you might call it.

The Court: Yes, I feel obliged to strike the question.

(Testimony of Mrs. John T. Dickerson.)

Mr. Johnson: That is all, then. Thank you very much.

The Court: Now I understand that you have no further testimony until 2:00 this afternoon.

Mr. Johnson: Yes. [139]

Mr. Clasby: That is right.

The Court: Mr. Hall, do you have anything at 1:30?

Clerk of Court: No, sir.

The Court: Very well. This case will be recessed until 2:00 this afternoon and court will recess until 2:00 p.m.

(Thereupon, at 11 a.m., a recess was taken until 2:00 p.m., October 11, 1956.) [140]

Afternoon Session

(The trial of this cause was resumed at 2:00, pursuant to the noon recess.)

Clerk of Court: Court has reconvened.

The Court: Are counsel and the parties ready to proceed?

Mr. Johnson: The plaintiff is ready, your Honor.

Mr. Clasby: We are ready.

The Court: Very well.

Mr. Johnson: I would like to call Mr. Jim Hutchison, please.

JAMES HUTCHISON

a witness previously called and sworn, was recalled by the plaintiff as a rebuttal witness for the plaintiff, and testified as follows:

(Testimony of James Hutchison.)

Direct Examination

Q. (By Mr. Johnson): You are James Hutchison, Jr., is that correct? A. I am.

Q. You have previously testified in this case, I believe? A. I have.

Q. As a witness for the defendant?

A. Right.

Q. You now have appeared here under subpoena as a witness for the plaintiff; is that correct?

A. That is right.

Q. You are connected with Fairbanks Motors?

A. I am.

Q. And have been for a number of years?

A. Yes.

Q. Does the Fairbanks Motors sell Dodge automobiles? A. Yes, they did.

Q. Were they selling Dodge automobiles in 1953? A. Yes.

Q. And for a number of years before that and since? A. Yes.

Q. Are you familiar with the 1953 model Dodge Coronet sedan? A. Yes, I am.

Q. With the gyro-torque transmission?

A. Yes.

Q. Have you ever driven a car of that type?

A. Yes.

Q. And I believe you testified previously that you had made repairs on that type of transmission from time to time? A. Yes, sir.

Q. Are you familiar with the general area known as Thompson Pass on the Richardson Highway?

(Testimony of James Hutchison.)

A. Yes, I am.

Q. Have you driven over that Pass?

A. Yes.

Q. Have you ever driven over it with a 1953 Dodge? [142]

A. No, sir.

Q. Have you ever driven over that Pass with a car that had a similar transmission?

A. No, sir; I haven't.

Q. From your general knowledge of the operation and mechanism of a gyro-torgue transmission, are you able to tell the Court how that type of transmission would operate on a long descent or a long, winding hill?

A. Yes; that transmission, unless——

Mr. Clasby: Just a moment. You have answered the question "Yes." That completes the answer. I would like to have a new question before you go further.

Q. (By Mr. Johnson): Now, will you describe to the Court the type of brakes that the ordinary 1953 Dodge Sedan Coronet model had on it, if you recall?

A. They were four-wheel hydraulic made by Lockheed.

Q. How were they operated?

A. They were operated by a foot pedal and a master cylinder.

Q. And you say they were hydraulic?

A. They are hydraulic, right.

Q. What, if anything, would result to that brake

(Testimony of James Hutchison.)

if that master cylinder or the brakeline containing the fluid should be broken? [143]

A. It would lose all braking power.

Q. What would cause that?

A. The fluid would escape through that brakeline by application of the master cylinder through the foot pedal.

Q. Then, that would leave the automobile without foot brakes? A. That is right.

Q. What other type of brake did that automobile have?

A. Self-energizing emergency brake actuated by a control lever in the operator's compartment, or the driver's seat.

Q. Where was that lever located?

A. On the 1953 Dodge it was located right down on your left side, right on the lower part of the instrument panel.

Q. Would that be to the left of the steering column? A. Yes.

Q. You say that is a self-energizing brake. Will you explain what that means?

A. When you apply the brake, when you pull the brake handle, it throws a shoe out against the drum, which again throws another shoe against the drum on the other side. One shoe energizes the other.

Q. Where do these shoes come together?

A. There is a drum.

Q. What part of the automobile?

A. There is a drum fastened to the drive shaft

(Testimony of James Hutchison.)

right behind [144] the transmission and those shoes are inside of that.

Q. So that the emergency brake or hand brake operates on just one drum, instead of all four wheels?

A. That is right, it operates on the drive shaft.

Q. Does that operate separately from the other brakes entirely? A. Yes, entirely.

Q. From your experience in driving a 1953 Dodge, are you able to tell the Court what effect it would have on the speed of descent if you started down an incline with a car in second or driving range?

Mr. Cole: We object to that.

Mr. Clasby: Are you able to tell, is the question—yes or no.

The Witness: Will you state that again, please?

The Court: We will have the question read by the reporter, please.

(Thereupon, the reporter read the last question.)

A. I would think the effect would be——

Mr. Clasby: No, you are not supposed to tell the effect but whether you are able to.

The Court: Whether you are able to—yes or no.

A. Yes. Let's put it that way.

Q. (By Mr. Johnson): Will you explain to the Court what would be the effect [145] of such an operation?

Mr. Clasby: To which we object, if the Court please, as calling for a conclusion of this witness,

(Testimony of James Hutchison.)

not in the manner of giving expert testimony relating to the facts in this case; no hypothetical question has been posed to him; we can't see the relevancy at this time to an answer to this type of question, nor can we see that a foundation has been laid in conformance with the issues before the Court.

The Court: I think the question is too indefinite to give an answer of value to me at this time, so I will sustain the objection.

Q. (By Mr. Johnson): Assume that you were at the top of a rather high elevation, such as Thompson Pass, but you might not know it; assume that you were driving a 1953 Dodge Coronet sedan with gyro-torque transmission, and assume that the fluid line on the foot brakes had broken and you had no foot brakes, but assume that you knew that you were about to descend; do you have an opinion from that state of facts as to what should be done before starting down?

Mr. Clasby: To which we object, if the Court please. The obvious answer would be to stop right there. It is supplanting this witness' judgment for the Court's judgment, and it is not relevant to the question that the court has under consideration. It is not a matter of giving expert testimony as to what the [146] laws of nature as applied to the mechanism involved here might accomplish under a given set of circumstances, injecting an opinion that we feel is immaterial and useless to the Court, and resolves the question before the Court.

(Testimony of James Hutchison.)

The Court: I will permit the answer.

Mr. Johnson: You may answer the question. Will you read it again, please?

Mr. Cole: If the Court please, may I make one statement?

The Court: I would like to have counsel decide which counsel is going to offer the objections.

Mr. Clasby: I will offer the objections, and I have made my objection thoroughly, and I think the Court understands most of it except there is an element here that is not helpful to the Court. This witness is not told what the rate of descent is or how long the descent is that is facing him. There are so many factors that any answer the witness gives to the question as it stands right now, I can't see where it would be helpful to us.

The Court: I thought maybe the witness would think the question insufficient to give an answer to, but he said he can. He may answer.

A. If the person operating the vehicle knew he had no brakes and he wanted to descend this hill, the obvious thing to be done would be to proceed down in lower gear—as low gear as you could get, and if the speed developed to where you would lose control, I would hit for the ditch. [147]

Mr. Clasby: I move that the last part of the answer be stricken, if it should appear to the Court that there is an attempt in the manner to prove some kind of custom.

The Court: I will strike that portion, "I would hit for the ditch."

(Testimony of James Hutchison.)

Q. (By Mr. Johnson): Do you have an opinion as to whether or not a car of this type under the circumstances explained could be kept under control by using the driving range or driving gear in descending as well as using the hand brake occasionally?

Mr. Clasby: To which we object, if the Court please. Descending what? We haven't got any question before us that has any pertinency to this case at all.

The Court: Sustained.

Mr. Johnson: Descending a hill such as Thompson Pass.

Mr. Clasby: To which we object, if the Court please. It is indulging in conjecture, has no relation to the issues in this case. We are concerned here with a specific automobile and specific circumstances on a specific stretch of highway, not what this automobile might or might not do on a similar road somewhere else.

Mr. Johnson: I asked him about going down Thompson Pass.

The Court: I am going to ask counsel to rephrase the question. [148]

Q. (By Mr. Johnson): Assume that you were about to descend Thompson Pass with a car of this type and model in the condition as described. Do you have an opinion as to whether or not you could descend Thompson Pass and keep the car in control by placing it in second gear or in driving gear and using the handbrake occasionally?

(Testimony of James Hutchison.)

Mr. Clasby: To which we object, if the Court please, posing to this witness a hypothetical question without clearly qualifying this witness as an expert to give an answer thereto, and embracing within this question all the circumstances that should be embraced in that type of question. I could itemize them but I believe they are so obvious to the Court, I am not required to as a part of the objection, but if the Court wants me to, I will.

The Court: I would like to have that spelled out.

Mr. Clasby: In the first place, the time of the year is not specified, the condition of the roadway is not specified, the condition of the weather as to fog is not specified, the condition as to whether it is night or day is not specified, the hours of driving the driver had to this date is not specified, the fact that the driver had never been over the mountains and did not know where they were is not specified, the use of the hand brake for some 30 miles before they reached the top of Thompson Pass and the condition ensuing therefrom is not [149] specified. We are left to conjecture as to what the witness had in mind when he answered the question.

The Court: I will have the question read, please.

(Thereupon the reporter read the last question.)

The Court: I will permit the answer.

A. Yes, that could be done. I believe it could be done. I know I could do it.

Q. (By Mr. Johnson): Could an ordinary driver do it?

(Testimony of James Hutchison.)

A. I believe an ordinary driver could——

Mr. Clasby: Just a moment. We object to that, if the Court please, again calling for a conclusion of this witness. No showing he is an expert, no showing he has observed ordinary drivers, no showing how many times he has driven over this Pass, no showing how long ago he has driven over this Pass, no showing he has ever been over it in the condition it is in now, too many variables that have not been taken into account.

The Court: I think there is some merit to the objection, but I will let the answer stand.

Mr. Clasby: I didn't get the answer, but if there was one I will move it be stricken on the same grounds.

Would the reporter read the answer to me, please?

(Thereupon the reporter read the last answer.)

The Court: You may complete the answer.

A. (Continuing): I believe that an ordinary driver could [150] descend that Pass safely under control if he was on the ball and knew what he was doing. He could follow the procedure of dropping the gear, applying emergency brakes sparingly, and following the shoulder of the road, the soft shoulder, and staying in that as much as possible.

Mr. Johnson: You may cross-examine.

Mr. Clasby: If the Court please, at this moment I would like to know if counsel is, by this answer, injecting into this case an issue beyond the pleadings, an issue never mentioned until this moment, a

(Testimony of James Hutchison.)

new and complete and different thing, that is to say, that this woman was negligent because she failed to drive on the shoulder of the road. If that is true, I am going to object, and I am going to object to the answer of the witness standing as evidence in this case, and ask it be stricken because it is based on something that is not in issue in this case, and I am going to object to it being brought into this case as an issue at this late date. We have been following a devious trail trying to find evidence and we are not going to inject a brand-new issue.

Mr. Johnson: Maybe we have been following a devious path, but just the same counsel is as much guilty as I am of that, and he has been using dilatory tactics. I am trying to point out by this witness exactly what could have been done upon that highway. The Court will remember that the testimony demonstrates very clearly that she drove on the outside sometimes [151] and sometimes on the inside of those curves going down that hill. That is the testimony in the record and it is undisputed. Certainly this is within the scope of the pleadings and all of the previous proof.

Mr. Clasby: It is not. It is a brand-new issue of negligence — brand-new. There has never been the slightest indication in the pleadings, in the brief, or any of the testimony to this point that counsel had any thought in mind of charging this driver with negligence by reason of a failure to drive on the soft shoulder of the road in assisting her in keeping

(Testimony of James Hutchison.)

the car under control. I have been surprised enough by the other issues, but this one is intolerable.

The Court: What is before the Court?

Mr. Clasby: My motion is to strike the entire answer because it is based on the injection of a new fact that is not in issue in this case. The whole foundation of the answer falls.

The Court: The motion will be denied and we will proceed. It seems obvious to me, and I decline to comment, and I wouldn't if it were a jury case, but it seems obvious to me that the witness has injected a lot of things that might have been done by the driver that are not within the testimony of this case, and I don't see how that is detrimental to the defendant, but you may proceed. The direct-examination had ceased.

Cross Examination

Q. (By Mr. Cole): Jim, you have already testified that you are familiar [152] with how the transmission on a 1953 Dodge Coronet, which is a gyro-torque transmission, operates, have you not?

A. Yes, sir.

Q. I just want to establish once again, go over it sort of clearly, as to how it works and what the gear ratios and the two gear shift positions are, how many gear shift positions there are with the gear level?

A. Including reverse, there are three.

Q. And how many forward?

A. Two gears you can shift for forward speeds.

(Testimony of James Hutchison.)

Q. How many speeds are there in each one of those? A. Two speeds in each gear.

Q. What is the lowest ratio called?

A. They call that your power gear when you are starting out.

Q. What is the highest gear ratio called?

A. That is your driving gear.

Q. And you say there are two speeds in each gear? A. That is right.

Q. That gives you a total of four forward gear speeds? A. That is right.

Q. If you were driving this automobile and descending down an incline, would you have any compression on the motor when the car was in the first gear speed?

A. It all depends on the speed. You would have above [153] six miles per hour.

Q. Would you have any compression in second gear speed?

A. Your second gear speed is the speed that the transmission shifts up to from the first speed. That is, the shift lever is in the first gear or low gear. Above six miles per hour it will automatically shift up into second gear, second speed.

Q. Would you have any compression if the car were in third gear speed?

A. No, unless the transmission had upshifted and you had obtained a speed of roughly 12 to 13 miles an hour.

Q. If the car were actually power flowing through the first gear speed system of gears, would

(Testimony of James Hutchison.)

you have any compression, and you haven't shifted into second?

A. If you stay below six miles per hour, you will stay in the first gear speed; you will not have any compression.

Q. That is right. When the car goes into the second gear speed power flow through that system of gears, do you have any compression there?

A. You mean if the thing upshifts?

Q. Yes, into second.

A. Yes, you have compression then.

Q. If you have the gear lever in the drive position and it is in the lower system of gears than the drive system, do you have any compression in third gear?

A. You don't have any compression until it upshifts. [154]

Q. Into fourth gear? A. Into fourth gear.

Q. And you have compression in the fourth speed? A. That is right.

Q. So summing up your testimony, the only gear speeds, the power system of gears, in which you have compression, is when the automobile is in the second-gear speed and in the fourth-gear speed?

A. That is right.

Q. I just wanted to establish that to clarify the operation of the transmission.

How fast or what possible speeds would it be possible to attain when the automobile was in the second-gear system, if you were rolling down an incline of approximately eight percent?

(Testimony of James Hutchison.)

A. I would estimate at full engine RPM, you would probably have 70 or 75 miles per hour coasting.

Q. If you were traveling down an incline in a 1953 Dodge with a gyro-torque transmission, a grade which averaged approximately seven percent, and traveled down that grade in second gear between about four and five miles an hour, could you give an estimate of the speed which the vehicle would attain?

A. No, I couldn't. There is no way you could estimate that.

Q. You don't have any idea?

A. No, I haven't any idea. [155]

Mr. Johnson: May I have that question read to me? I didn't quite get it.

The Court: Certainly.

(Thereupon the reporter read the next to the last question and the answer.)

Q. (By Mr. Cole): Just one other thing, involving the power flow from the motor to the rear wheels of a 1953 Dodge Coronet, how does the power actually flow from the piston to the rear wheels? Could you just go through that? I don't mean in great detail, I mean in just broad terms.

A. Yes. The power flows through the torque converter or fluid drive, through the clutch. There is a clutch lever—and through the transmission, through the differential to the wheels.

Q. From the crank shaft of the motor, it goes

(Testimony of James Hutchison.)

through a fluid drive unit and through the transmission and then to the rear wheels? A. Right.

Q. Would you describe just briefly what that fluid drive unit contains?

A. It is what they call stators. They look like veins like on a turbine, when they are facing one another, and this unit is filled with oil, and these stators, the front one is fastened to the crankshaft, throws the oil to the back side of [156] the fluid drive, which transmits power to the transmission.

Q. So there is actually no mechanical transmission between the front part of the fluid drive unit and the rear part of the fluid drive unit?

A. No. It is oil.

Q. All that there is between that is oil?

A. That is right.

Q. And the power is transmitted through the rotation of the front runners, so to speak?

A. Yes.

Q. And to the rear one, and from there goes into the transmission? A. That is right.

Q. And there is only braking force in that transmission when the car is in second gear and the fourth gear? A. That is right.

Q. So in order to have any braking force from the motor perceptibly you would have to have the car in the second gear?

A. That is right; it has to be in second gear.

Q. Otherwise, you have absolutely no braking force from your motor? A. That is right.

Mr. Clasby: That is all. [157]

(Testimony of James Hutchison.)

Redirect Examination

Q. (By Mr. Johnson): Jim, I believe you stated that in this transmission unit where these two plates—I think you called them stator plates—do they set in the unit opposite each other; is that right? A. That is right.

Q. And they are enclosed in a housing which is filled with oil; is that right? A. That is right.

Q. When the unit engages, what, if anything, happens as far as these stator plates are concerned?

A. When the engine builds up a certain amount of RPM's, the oil more or less becomes solid. It is a solid unit. It acts as a direct unit, riding coupling, between the engine and the transmission.

Q. Then, as I understand it, these two stator plates do not move toward one another; is that right? A. They are stationary.

Q. Then, it is simply the speed of the engine which tends to solidify this oil; is that right?

A. That is right, just like an oil pump.

Q. What, if anything, does that do with respect to holding back the whole mechanism?

A. It works in reverse just the same way as it would going [158] ahead. The oil still solidifies and is locked up in there.

Q. When it is locked, then it is unable to move; is that correct? A. That is right.

Q. And it reduces the speed of the drive shaft to that extent, or what happens?

A. A direct coupling between the transmission and engine—it is solid.

(Testimony of James Hutchison.)

Q. Now, when you answered a question asked by Mr. Cole you stated, I believe, that you had braking action in this transmission only when it was in second and fourth speeds; is that right?

A. That is right.

Q. However, if you start out in, let us say, first speed by putting the gear shift handle up, how long and what happens before you proceed from first speed to second speed?

A. It all depends on the speed developed by the car, how fast you are driving and how fast you apply, how much throttle pressure you apply to build up speed. It only takes six miles per hour to shift that transmission into second speed.

Q. If you started from a stand-still you would be in first gear until you reached a speed of six miles an hour? A. That is right.

Q. After you reached that speed of six miles an hour, is there any way of advancing it to third speed without the use of [159] the clutch pedal?

A. In some cases it would be possible.

Q. What is the normal procedure?

A. The normal procedure is to depress the clutch pedal and pull the lever down into the third speed.

Q. How long have you been driving a car or an automobile?

Mr. Clasby: We object. That is going way beyond redirect-examination.

The Court: I think it is true, but I will permit the answer.

(Testimony of James Hutchison.)

A. Well, I have been driving since I was twelve years old.

Q. (By Mr. Johnson): How many years would that be, roughly? A. Let's see—23.

Q. About 23 years? A. That is right, sir.

Q. If you were driving in a 1953 Dodge sedan of the type and condition as we have in this case and you reached the summit of a high incline and were about to descend and not knowing whether it was steep or anything about the conditions, and if you should approach such a spot at night when it was dark and the fog or clouds were hanging around the area obscuring the vision considerably, but nevertheless knowing that you were about to descend some sort of a road, that the road was covered with asphalt, was dry, what in your opinion, as an experienced driver, [160] would an ordinarily prudent person do before descending on such a road?

Mr. Clasby: If the Court please, that is objectionable for several reasons. The last one, a reasonably prudent person, that is up to the Court to decide. First, it is improper redirect-examination, no permission has been asked by the Court to go back into his case again. Second, if it is a hypothetical question, again it does not state all the things that should be in a hypothetical question, and a hypothetical question is out of order at this particular time. It is certainly no way to prove custom, if he is trying to prove custom, and if this were a jury case, our objection would be it would be taking the question from the jury and the Court would under-

(Testimony of James Hutchison.)

stand it. You can't substitute what this man would do with what an ordinary man would do. That is up to the Court to find.

The Court: I feel obliged to sustain the objection on the following grounds: it is improper redirect-examination, the question is indefinite, and it calls for the opinion of the witness on the ultimate fact to be determined by the Court.

Mr. Johnson: That is all.

Recross Examination

Q. (By Mr. Cole): Jim, you are a good driver, aren't you? A. I think so.

Mr. Cole: That is all.

The Court: Before you leave, just a moment, please. for [161] my own clarification and thinking, there has been testimony here about first gear, second gear, third gear, and fourth gear, and low gear and high gear.

The Witness: Yes.

The Court: I would like to know whether the low gear is the same as first and second.

The Witness: Actually, it is not. Low gear on that model car is a lower gear than the second speed gear. It is a lower gear ratio, is what it is, the first speed, but the way this transmission is designed and built, it will not stay into that speed.

The Court: It goes into the so-called second gear without any additional shifting?

The Witness: That is right. It is a semi-

(Testimony of James Hutchison.)

automatic transmission. It is shifted by hydraulic pressure.

The Court: How many different shifts, hand shifts or positions of the hand lever are there?

The Witness: Including reverse, there are three. There is your first speed and your high gear and you lift it up for reverse.

The Court: What does the low gear you speak of include?

The Witness: Well, it is quite a detailed explanation there. That is mainly, it is a main shaft, what they call the first gear in the transmission, and the lower cluster gear. It is a part of the main power train. I would have to have a [162] manual in order to fully describe it to you, how it operates.

Mr. Cole: I think I have maybe a question or two which would be helpful.

The Court: Could you clarify that?

Mr. Cole: Yes.

Q. (By Mr. Cole): Perhaps we had better use the blackboard, because I realize it is confusing. (Drawing diagram on blackboard.) Now, use this as the gear shift lever positions for power, the low speed gear ratio, the power, and this will be the drive.

When the gear shift lever is in power, you have two systems of gears which will operate when the gear shift lever is placed in the power position, do you not? A. That is right.

Q. This one system of gears is called first gear,

(Testimony of James Hutchison.)

and the other system of gears is called second gear; is that correct?

A. Yes, that would be right.

Q. And when the power is in one, the power flows through the so-called main drive?

A. That is right.

Q. And then it goes down from there into a lower system of gears called countermesh gears?

A. The counter gear cluster. [163]

Q. And then it goes over here to another gear and then it goes up to a gear here, and there is a system called another clutch?

A. Synchro-mesh unit.

Q. And the power goes from there back to the rear wheels? A. That is right.

Q. That is your full gear system; is that correct? A. Yes.

Q. When the power is being applied in this first system of gears you have no compression?

A. That is right.

Q. Because as you used the gear right here it doesn't have compression going back through there?

A. No, that is a free-wheeling gear. The lower cluster has ball bearings in it which allows it to slip.

Q. Then, as the car is accelerated and the foot taken off the accelerator, the car automatically shifts into second gear in the power range; is that correct? A. That is right.

Q. And that system of gears is roughly this gear, which is here is out here forward, and then it

(Testimony of James Hutchison.)

comes back through here, and the set of gears, and back to the power, the wheels, the differential?

A. Yes.

Q. There is compression through this system of gears [164] because your counter-mesh gear is not in the power system?

A. That is right, it is locked.

Q. Now, then, there is another system, if the car is shifted and put into the driving range, there are also two forward speeds, are there not?

A. That is right.

Q. And the ordinary way that the average driver shifts the gear shift lever, from the power range to the driving range, is through the operation of the clutch? A. That is right.

Q. The manual clutch. When the car is in the third gear range, the power comes back through this so-called main drive pinion and then it goes down to another gear, which is called the transmission rotating gear, back to another gear in the lower system to a gear in the upper system and back to the rear wheels; is that not correct? A. Yes.

Q. And when the car is being operated in this system of gears there is no compression from the rear wheels on to the engine because you are using the counter-mesh rotating gear in the system; is that not correct? A. That is true.

Q. Now, there is one more forward speed in this type of transmission, and that is when the power comes back through the main drive pinion, and it goes right straight back through a [165] selective

(Testimony of James Hutchison.)

system of gears to the rear wheels and the lower gear system is not used; is that not correct?

A. Yes, free wheeling.

Q. So that there is a braking force on the engine from the rear wheels if power is not applied and the car is coasting down an incline?

A. That is right.

Q. So there is braking in No. 2 system and there is braking in the No. 4 system; isn't that correct?

A. That is right.

Q. Now, the amount of braking which you have through the No. 4 system is perhaps slightly less than it would be in the normal car in high gear; isn't that correct?

A. Yes, it is.

Q. And the amount of braking which you have in the second gear system is probably somewhere between the second gear in an ordinary standard transmission and high gear in an ordinary standard transmission?

A. Similar thereto, yes.

Q. But it isn't as much as you would have in second gear in an ordinary automobile?

A. No—that is right.

Q. There is one other point which I would like to demonstrate to the Court, if I may.

The Court: You may ask a question subject to objection. [166]

Mr. Cole: Yes, of course.

Q. (By Mr. Cole): When power is generated in the motor from the pistons it is transmitted to the crankshaft; from the crankshaft it is transmitted back through this fluid drive unit; is that right?

(Testimony of James Hutchison.)

A. That is right.

Q. That is where the oil is, in that?

A. Yes.

Q. And there is no mechanical connection between the front part of the fluid drive system and the rear part of the fluid drive system?

A. Right.

Q. The power comes out the back part of the fluid unit, then it goes into this system of gears which we have previously discussed, known as the transmission? A. That is right.

Mr. Cole: Is that helpful?

The Court: Very well. Do you have any questions, Mr. Johnson, on this matter?

Redirect Examination

Q. (By Mr. Johnson): I would like to clear up one matter. During this case we have been discussing gears in the terms of drive and power and using them somewhat synonymously with low and high, as applied, however, to a four-gear transmission, such as this [167] drawing illustrates. Now, whenever I used the word "low" gear, did you understand me to mean the very lowest gear here, or the low power range, I mean?

A. Low gear, I understand, was the low gear like you come to a complete stand-still, you shift the lever up into the low gear. Second speed differs from a low gear.

Q. That is right. This power range is sometimes referred to as low range, and driving range?

(Testimony of James Hutchison.)

A. Yes, it is low range.

Q. As contrasted from the high gear or driving range; is that correct? A. That is right.

Mr. Johnson: That is all.

The Court: Now I wonder if the reporter can find the question I asked the witness.

(Thereupon the reporter read the questions by the Court as heretofore recorded on page 162 of this transcript, and the answers thereto.)

The Court: That was what I was getting at and what didn't come out now.

No further questions of Mr. Hutchison? He is excused.

(Witness excused.)

(Thereupon a ten-minute recess was taken.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, you may proceed.

Mr. Johnson: Thank you, your Honor. [168]

The plaintiff would like to call Lieutenant Botelho.

EMMET MANUEL BOTELHO

called as a witness in behalf of the plaintiff in rebuttal, after being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Johnson): Will you state your name, please?

A. Emmet Manuel Botelho.

Q. Where do you reside, Lieutenant?

A. Anchorage.

(Testimony of Emmet Manuel Botelho.)

Q. Do you have any official capacity or station with the Territory of Alaska?

A. Yes, sir, I am in charge of all outlying districts, Homer, Kenai, Seward, Palmer, Glenn Allen, and Valdez.

Q. For what department?

A. The Territorial Police.

Q. How long have you been a member of the Territorial Police?

A. It will be fifteen years the 15th of April.

Q. I believe you stated that in the course of your duties you are in charge of what you call outlying areas; is that correct?

A. That is correct.

Q. And that includes Valdez?

A. Valdez, yes, sir. [169]

Q. Does it include the vicinity known as Thompson Pass on the Richardson Highway?

A. Yes, sir.

Q. Were you familiar with or in charge of that area in 1953? A. No, sir, I was not.

Q. Were you familiar with the area that year?

A. No, sir.

Q. In 1953? A. No, sir.

Q. Had you ever been over Thompson Pass at any time during 1953? A. No, sir.

Q. Have you ever been over it since that time?

A. Yes, sir. I took charge two years ago and during that time I make an average of one to two trips every month winter and summer.

Q. What was the condition of the highway from

(Testimony of Emmet Manuel Botelho.)

the summit of Thompson Pass south to Valdez with respect to surfacing?

A. It is all blacktop there.

Q. And was it blacktop at the time you took it over? A. Yes, sir.

Q. Did you have occasion to get a map of this area from the United States Geological Survey at my request? A. Yes, sir. [170]

Clerk of Court: Plaintiff's Identification No. 5.

(The map was marked Plaintiff's Identification No. 5.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 5 and will ask you if that is the map that you referred to.

A. Yes, sir; it is. That is my handwriting there with the signature of the gentleman that gave it to me.

Q. And does that map, in addition to having the printed markings on it which come with the map originally, exhibit some pen and ink marks or lines drawn on it? A. Yes, sir; it has.

Q. And some figures?

A. And some figures.

Q. Who placed those pen and ink marks and figures on there? A. Mr. Isto.

Q. And with whom is he connected?

A. The Geological Survey, sir.

Q. And he produced this map and placed these markings on there at your request?

A. Yes, sir.

Q. Did he do it in your presence?

(Testimony of Emmet Manuel Botelho.)

A. Yes, sir.

Q. What data did he use for putting on those marks?

A. I requested, I told him exactly what I wanted and [171] asked him——

Mr. Clasby: Just a moment. We object to the answer and ask it be stricken. It is not an answer to the question that was asked.

Q. (By Mr. Johnson): What did he use for information in putting on those markings and figures, if you know?

Mr. Clasby: I object to that as being hearsay; as far as we are concerned, we don't want to get information in here secondhand.

The Court: That is what we are heading for, there is no doubt. I can see that the identification would be hearsay, or portions would be hearsay, and it will be sustained. I wonder if you wanted to show it to counsel.

Q. (By Mr. Johnson): First of all, what do these markings purport to mean or signify?

A. They are mileage or grade points.

Q. By "grade points," what do you mean?

A. The average of different grades in the miles, the downgrade. What I asked, I can't exactly explain it——

Q. Are you talking about the percentage grade?

A. The percentage grade of descent, that is right, sir.

Q. And those are the markings that appear on that? A. That is correct. [172]

(Testimony of Emmet Manuel Botelho.)

Q. And for the portions of Richardson Highway which descends Thompson Pass on the Valdez side?

A. That is correct, sir.

(Mr. Johnson handed the map to defendant's counsel.)

Mr. Clasby: We would object, if counsel were offering the identification as an exhibit, to its admission in evidence on the basis that it purports to show grades from a source of information that we have no knowledge about or opportunity to cross examine. We don't know how accurate these are or how accurate that could be.

Q. (By Mr. Johnson): I believe you stated that the gentleman who signed his name to this, Mr. Isto, works for the United States Geological Survey?

A. That is correct, sir.

Q. And did he place those figures and percentages on that map from information which they have in his office? A. Yes, sir.

Mr. Johnson: We believe that the proper foundation has been laid and we offer it, your Honor.

The Court: I am obliged to sustain the objection as hearsay and no proper foundation laid.

Q. (By Mr. Johnson): From your experience as a highway patrol officer, have you had occasion to drive down Thompson Pass? [173]

A. Yes, sir.

Q. From the summit toward Valdez?

A. Yes, sir.

Q. What, if anything, did you do with reference

(Testimony of Emmet Manuel Botelho.)

to conducting tests on that side of the pass in different methods of driving, and so on?

Mr. Clasby: Just a moment. I would like to have the question specific enough so that we would have some idea of the train of testimony to see if it is within the issue that is being opened up by counsel. I can't tell whether this is getting clear off the beaten track again or whether we are still confining ourselves to the point of this phase of the hearing.

The Court: I can't tell from your statement what objection you are making, Mr. Clasby.

Mr. Clasby: It is impossible, if the Court please, for us to tell when he asks the witness: have you ever conducted any tests about driving down the Valdez side of Thompson Pass?—if he answers "Yes," then I may have a further objection—just what counsel's point is, whether he is within the scope of his examination or not. I think he should define the type of test he has in mind.

The Court: Yes, I think if you had merely made the concise objection, I would sustain it, and I will sustain it as being incompetent, irrelevant and immaterial at this time as to whether he ever did.

Q. (By Mr. Johnson): Will you describe to the Court the descent of the Richardson Highway from the summit of Thompson Pass on down, and tell the Court as nearly as you can from your own observation and memory what it looks like, what it consists of, in the way of curves, and how steep it is, if you know anything at all about it?

(Testimony of Emmet Manuel Botelho.)

A. Well, from experience, the first time I went over the incline two years ago——

Mr. Clasby: Just a moment. Would you just answer the question, please?

Q. (By Mr. Johnson): Describe it as nearly as you can.

A. I would say it is a steep grade from the crest of the hill at Thompson Pass down, the first two miles is very steep. After the two miles you come to an extreme curve to your right. From there on down it is practically another seven miles of straight highway, which I should judge would be a grade of about seven percent—seven or eight percent, which is considered an extremely steep grade.

Q. Are there any sharp curves from the summit down to this first point at, you say, about two miles below the summit? Are there very many sharp curves or turns in that first two miles?

A. No, it is not—not too severe.

Q. They are more or less gradual? [175]

A. Gradual curves.

Q. Do you have any knowledge of the grade of descent or the rate of descent in the first two miles?

A. Well, I think it would average out at around——

Mr. Clasby: Just a moment. Are we understanding that you are testifying from your memory and your experience and not the information that you have through this document that was excluded from evidence?

The Witness: From my own memory, sir.

(Testimony of Emmet Manuel Botelho.)

Mr. Clasby: All right.

Q. (By Mr. Johnson): Now, what is your memory with respect to the rate of descent from the summit down to that two mile curve?

A. I would say it is about a six percent grade.

Q. On an average all the way?

A. Yes, sir.

Q. From your experience as a highway patrol officer, is a six percent grade steep or gradual, or how would you describe it?

A. It is a very steep grade, sir.

Mr. Johnson: That is all.

Cross Examination

Q. (By Mr. Clasby): As I understand it, you have a curve down the hill about two miles from the summit? [176]

A. That is correct, sir.

Q. Would it be fair to state, in describing that curve, that is is a 35-mile-an-hour curve, or a 25-mile-an-hour curve; that is, is it fair to state in terms of speed around which you can go around the curve?

A. For a safe speed, I would say 30 miles an hour, sir.

Q. And at the bottom of this run of seven miles there are some curves, are there not?

A. Yes, there are, sir, but not very extreme curves. Just short, and not too dangerous.

Q. At what speeds can those be safely negotiated?

A. I would say between 25 and 30 miles an hour.

(Testimony of Emmet Manuel Botelho.)

Q. At the top of the summit, approaching from this side, does the degree of ascent level out some distance this side of the summit and become more gradual until the top of the summit is reached and then more gradual on the other side for a distance?

A. Yes, sir.

Q. What is the distance on this side of the summit that you would say the road extended where the grade wasn't significant?

A. I would say the first mile, sir.

Q. And on the other side of the summit, the Valdez side, about what distance would you say, as a driver, that the grade is not significant? [177]

A. Are you referring to past that bad curve on the straightaway?

Q. No. Visualizing you have come to the very top of the summit, how far ahead of you in distance would you say the road was where there was no significant grade, as far as a person driving an automobile is concerned, realizing you immediately start downward. I think you have in mind what I have in mind. How far must you go after you reach the crest before you come into a grade that is appreciable?

A. About a mile, sir.

Q. About a mile? A. Correct.

Q. So you have a two-mile area, one mile on each side of the actual crest, where the grade is, let us say, more or less normal for highway driving?

A. Yes, sir; after you pass the first mile there it kind of tapers off gradually.

(Testimony of Emmet Manuel Botelho.)

Q. And then as you go toward Valdez, after the first mile, you do run into a steeper grade?

A. That is correct.

Q. And is that where this curve is?

A. The curve is on the two-mile stretch, sir.

Q. Then, you run into a steeper grade?

A. After you pass that. [178]

Q. And then do you level off a bit again before you go into the place where the curve is?

A. Just a trifle. I would say it is only about two degrees difference between your steep and where it levels off.

Q. And this last bit of descent is about seven miles; is that correct?

A. That is correct, sir.

Q. At an average angle of about seven percent?

A. Seven percent straight through.

Q. Straight through? A. Yes.

Mr. Clasby: Thank you.

Redirect Examination

Q. (By Mr. Johnson): Now, Emmet, I have become a little bit confused on this. When you refer to the summit, counsel has asked you if the summit itself extends on a level plane for quite some distance or if it is just a noticeable hump and then immediately starts down—do you know, is it a table top or something like that?

A. It is fairly table top, when you come to the crest of the summit, then you start down a grade.

Q. How long is that crest?

(Testimony of Emmet Manuel Botelho.)

A. Well, I would say not over two hundred feet.

Q. When you reach that crest, you go 200 feet level and [179] then immediately start down; is that correct?

A. It starts tapering off, sir.

Q. But it starts down?

A. It starts down, that is correct.

Q. With reference to this 200 feet, or this crest, where does the six percent grade begin? Right at the end of it?

A. It just starts tapering right off of the end of it and starts going down. It might be a little more than 200, I couldn't say exactly. I am just estimating.

Q. But it isn't a mile?

A. No. I would say two or three hundred feet, at the most. Then it starts to taper down at a steep grade.

Q. In your work as a highway patrolman, have you attempted to descend from the crest down to that first curve with an automobile by free wheeling, so to speak, or having it in no gear at all?

A. I have, sir, yes.

Q. Have you been able to observe from that operation how far you traveled down that curve—

Mr. Clasby: Just a moment. If the Court please, this again is not proper redirect-examination. I object on that basis.

The Court: It certainly is not proper redirect-examination, but I will overrule the objection.

Mr. Clasby: Then, I move that it be an objection on the [180] basis that it is incompetent, irrelevant

(Testimony of Emmet Manuel Botelho.)

and immaterial, the kind of experiment a person might have conducted.

The Court: I will sustain it at this time.

Mr. Johnson: I have no further questions. Thank you very much.

Mr. Clasby: I have no further questions.

(Witness excused.)

Mr. Johnson: That is all.

Mr. Clasby: We at this time think it is appropriate to renew our objections before we ask to go forward. We submit there has been nothing new brought in here than can add anything to the testimony that the plaintiff already had, nothing at all to indicate that the conditions were anything different than the Court had before it at the time of our original motion, and we have a much clearer conception of the gears on the car and how the car worked and also by virtue of that knowledge that the engine force exerted when in second gear is something just slightly less than high gear in the conventional type of automobile. We now have knowledge that in the second gear, with the application of power, speeds of 75 and 80 miles an hour can be achieved. We still have no knowledge of how much higher speeds may be reached with a vehicle going without the application of power, of coasting. It seems practical to presume as lay persons that it probably would exceed that speed which can be produced by the application of power, and we have a hill down beyond where apparently the car crashed, seven miles long, [181] with a seven-percent grade,

and the need to negotiate the bottom of that hill, a curve, at speeds not to exceed 25 miles an hour, and I don't discover in any of the additional testimony anything at all that appears to me helpful to the plaintiff or that in any way changes the circumstances and evidence that existed at the conclusion of the plaintiff's case. If anything has been accomplished by the evidence, it has been to buttress the position and argument taken by the defendant.

Mr. Johnson: If the Court please, I should like to make a request before the Court rules on this particular motion. You will recall that at the beginning of the case we had interposed a motion to amend the complaint. That motion was taken under advisement and has never been ruled upon. If it is permissible, we would like to have a ruling on that motion so that it is in the record before the Court rules on the motion just now made.

The Court: And, Mr. Johnson, what motion do you refer to that the Court reserved ruling on?

Mr. Johnson: I am referring, at the beginning of the case before we began taking testimony, I asked leave to amend the complaint by interlineation in paragraphs 7 and 8, raising the amount requested from \$15,000 to \$50,000, in accordance with the 1955 Statute, and if I recall correctly, the Court did not rule on the motion at that time. I could be mistaken about it.

The Court: That is correct, and I now know what motion you refer to, and my statement was, or I intended it to be, [182] that I would reserve ruling on that motion, depending upon what I did on

the question of liability. The motion would be moot if I determined that the liability was not established. There would be no reason for ruling on the motion. But I want to give you an opportunity, if you wish, to resist the motion just made by the defendant. Do you resist the motion?

Mr. Johnson: Of course, we resist. We resist it entirely on the basis that we believe the evidence clearly establishes the negligence of the driver of the automobile in descending this unknown hill, if you wish to call it that, without brakes, knowingly without brakes, but knowing also in descending any type of hill that the best method of procedure, even with this complicated mechanism and gears, that the best method of procedure is to put it in the power range, because the moment it transfers from first to second there is a braking action on the part of the engine and the witness Mr. Hutchison testified that a car of this condition could have been driven safely to the bottom of the hill, and obviously Mrs. McDonald knew that when she said, after they had started down, not to jump out or not to get worried because as soon as she got the car in gear everything would be all right. Even she knew it, and certainly it indicates very clearly to me, at least, that that is an act of negligence and is an omission to do something that an ordinarily prudent person would have done under similar circumstances, and we believe that on that basis that the plaintiff has established [183] a case of negligence on the part of the driver of the automobile and that the plaintiff's intestate was not responsible in any

way, did not contribute to that particular act, because it started from the moment they had their prayer meeting and continued on until they ran off the road. She was in full charge of the car and certainly made the decision to go forward, knowing the condition of the terrain and the surrounding area and the wilderness that existed, and knowing also that there was no other place to go except to get out, particularly when one of the occupants of the car, at least, was so frightened as to want to jump out and save herself, and so far as I know there is no denial of that testimony. It is corroborated by the boy, who says that his mother had ample opportunity to do the things that an ordinarily prudent person, I believe, would have done and should have done. Even if she had left it in high gear after starting down, she would have had some method of braking action, because as Mr. Hutchison says, that the minute you put it into high range it goes into third momentarily and automatically advances into fourth gear, and that is the gear that has the brakes or compression action. She knew something was wrong and she knew she had done something wrong when she got the thing out of gear and it was rolling along in neutral. Then suddenly somebody wanted to jump out of the car, which I assume is a natural reaction, but she was told, "Oh, no, don't bother to jump out. You are going to be all right. I am going [184] to get this in gear in a minute and everything will be fine," and then they say that is not negligence. We believe it is, your Honor.

(Thereupon a ten-minute recess was taken.)

The Court: To make the record clear, I understand that the motion now before the Court is the defendant's motion to dismiss; is that correct?

Mr. Clasby: That is correct, made at the conclusion of the plaintiff's case—made at the conclusion of the case with respect to all except possibly rebuttal to this additional testimony that went in pursuant to permission to reopen the direct-examination.

The Court: There would be no object in your rebuttal testimony if I should grant the motion.

Mr. Clasby: There would not. The Court has before it the facts.

The Court: Now we come to the stage of the proceeding that is indeed trying and difficult for me, but I feel that I must grant the defendant's motion to dismiss.

I found during the trial, as you all know and as I have announced on more than one occasion, that the plaintiff's intestate was guilty of contributory negligence or at least assumed the risk of riding in defendant's vehicle, knowing that the foot brakes were worthless, and I heard further testimony on the theory that the contributory negligence of the plaintiff's intestate, or if you prefer to call it the assumption of risk, became static [185] when the persons proceeded on and perhaps the plaintiff could predicate his claim on subsequent negligence of the driver of the car with full knowledge on the part of the driver and the plaintiff's intestate that the brakes were worthless and had no effect. So it was

on that additional theory that we proceeded with the trial and heard testimony.

The plaintiff rested, the defendant rested, and I indicated that I could see nothing in the evidence that would permit recovery. I couldn't see that the driver of the car had violated any duty that she might have owed to the plaintiff's intestate. So permission was given to reopen, and I was carefully trying to examine the evidence to see whether or not the driver of the car used reasonable care for her own safety and for the safety of others in starting down that long hill without putting the gearshift into the low gear. So then we had additional testimony, and one man, who is an expert, and I think I was very liberal in permitting the plaintiff's witness to testify, said that the car even in the low gear on the incline in question would gain a speed of from 70 to 75 miles per hour, and then the testimony of the plaintiff's witness brought in after I permitted plaintiff to reopen gave this answer, and I quote, and this is on direct-examination:

"I believe that an ordinary driver could descend that Pass safely under control if he was on the ball and knew [186] what he was doing. He could follow the procedure of dropping the gear, applying emergency brakes sparingly, and following the shoulder of the road, the soft shoulder, and staying in that as much as possible."

Now, I don't believe that ordinary care that is required of a person under the circumstances, as the defendant's wife was, required doing that which the expert witness said might have been done, be-

cause those aren't in my opinion driving measures that would be expected of an ordinary person, and I find nothing in the evidence to prove the negligence of the driver of defendant's motor vehicle such as would enable a recovery in this case, and I therefore grant the defendant's motion for dismissal.

Now, in the hope that it might be raised on appeal, perhaps I am wrong in saying that the question is moot, because plaintiff's counsel has urged on me again to rule on the motion to amend the complaint to increase the amount. So as to clarify the record in that respect and to give the plaintiff any possible benefit of the ruling, I will deny the motion to increase the amount, hoping that that might be reviewed on appeal.

Mr. Clasby: Would the Court care to have us prepare a written Order?

The Court: If you wish, you may submit one.

Mr. Clasby: Would the Order embrace costs?

The Court: I will consider that.

Is there anything further at this time? If not, Court will adjourn.

(Thereupon at 4:10 p.m., October 11, 1956, the trial of this case adjourned sine die.) [188]

[Endorsed]: Filed Oct. 29, 1956.

[Endorsed]: No. 15381. United States Court of Appeals for the Ninth Circuit. Earl G. Aronson, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent, Appellants, vs. George A. McDonald, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed: December 10, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15381

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of the said Estate of Flora Ritta Mae Aronson and Earl G. Aronson, surviving husband, and Earlene A. Roberts, Betty C. Howard, and Earl G. Aronson, Jr., surviving children of said decedent, Plaintiff, Appellant,

vs.

GEORGE A. McDONALD,

Defendant, Appellee.

DESIGNATION OF RECORD

The Appellant, above named, by Maurice T. Johnson, his attorney, hereby adopts the original Statement of Points and original Designation of Record appearing in the typewritten transcript of the record now on file in the above entitled court, and requests that this Designation of Record be also included in the abstract, pursuant to Rule 17(6).

Dated at Fairbanks, Alaska, this 13th day of December, 1956.

/s/ MAURICE T. JOHNSON,

Attorney for Appellant

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 15, 1956. Paul P. O'Brien, Clerk.